Supreme Court, U.S.
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In The

Supreme Court of the United States

TAG INVESTMENTS, JAMES A. GRETTUM, CAROL A. GRETTUM, and JONATHAN T. GARAAS,

Petitioners,

v.

MATRIX PROPERTIES CORPORATION, a MINNESOTA CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The North Dakota Supreme Court issued its mandate on June 7, 2000, upholding a lower court's Judgment in equity ordering TAG Investments and James A. Grettum " . . . to specifically perform under the Option to Purchase dated October 14, 1996."

The lower court, with the approval of the North Dakota Supreme Court, has entered orders and subsequent judgments based on unprecedented post-judgment motions for monetary damages in a specific performance action in which a final judgment had been entered almost two years earlier. Neither the optionee, nor the lower court, identified the legal basis for the unprecedented award of "costs [$4,127.60]," "damages [$61,059.18 – after appeal]," and "attorney fees [$48,642.00]" [App. 21-22] two years after the final judgment had been entered. The post-judgment motion procedures sanctioned by the lower court, and approved by the North Dakota Supreme Court, denied TAG Investments and James A. Grettum of their right to proper pleadings notifying them of the issues of the lawsuit, discovery, trial of issues of fact, a jury trial, and a judicial decision based upon properly introduced evidence considered in light of the law – a violation of Due Process of Law.

In a companion case, with the approval of the North Dakota Supreme Court, the lower court has entered orders and judgments, without evidence, legal basis, or meaningful hearing, which resulted in: (a) a judicial taking 27 acres of land from the record title owner and unnamed party, Carol A. Grettum, based upon a judicial determination of payment by her receipt of a dishonored check for

QUESTIONS PRESENTED – Continued

$254,830.08; (b) a judicial taking of TAG Investments and Carol A. Grettum's statutory vendor's lien due to inadequate payment if the executory contract exists; (c) a judicial action depriving TAG Investments and Carol A. Grettum of a reasonable remedy to protect their contractual and statutory rights; and (d) a judicial monetary sanction against TAG Investments and its attorney, Jonathan T. Garaas, totaling $7,344.59 for merely asserting factual and legal truths.

The questions presented here are:

1. Does the Fourteenth Amendment prevent a State court from issuing a monetary judgment of both sanctions and claimed legal damages by unprecedented post-judgment motion that is made (a) without support of the North Dakota Rules of Civil Procedure, (b) without proper notice to litigants of the legal and factual basis for the motion, (c) without a trial of issues of fact, (d) without a judicial decision based upon properly introduced evidence considered in light of the law, (e) without support in statutory law or case law, and (f) without evidence of any damage?

2. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota to protect Federally protected rights of freedom of contract?

3. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota to prevent the denial to litigants of established adjudicatory procedure thereby depriving litigants

QUESTIONS PRESENTED – Continued

due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America?

4. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota to prevent what is tantamount to spoliation of real property and contract rights by unprecedented judicial proceedings that deprive litigants of their real property and contract rights without full payment as envisioned by the underlying contract?

5. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota because it has sanctioned the judicial divestment of litigant's real property when a litigant was not a party to the specific performance action, nor allowed to intervene in the specific performance action, nor paid any monies for the land the litigant owns?

6. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota because it has sanctioned litigants and their counsel for advocating that neither the underlying contract, the law and rules of procedure of North Dakota, and the Fourteenth Amendment to the Constitution of the United States of America would allow what the North Dakota courts have done to James A. Grettum, Carol A. Grettum and TAG Investments?

7. Have statutes and rules of procedure been applied equally to Petitioners as required by the Fourteenth Amendment?

LIST OF ALL PARTIES TO THE PROCEEDING

A. List of Petitioners.

TAG Investments, a partnership consisting of James A. Grettum, R. Allan Rostad, Thomas Richards, P.O. Box 9121, Fargo, ND 58106;

James A. Grettum and Carol A. Grettum, husband and wife, of 4842 Rose Creek Parkway, Fargo, ND 58104;

Jonathan T. Garaas, Garaas Law Firm, who as attorney for the other petitioners was sanctioned along with TAG Investments and Carol A. Grettum for trying to assert federal constitutional rights on behalf of his clients.

B. List of Respondents.

Matrix Properties Corporation, a Minnesota Corporation, P.O. Box 1389, Fargo, ND 58107-1389.

C. Nominal Parties to the Quiet Title Action.

The caption to the quiet title action, one of the decisions that gives rise to this petition, lists J.C.G. Investments, L.L.C. (a North Dakota limited liability company consisting of James A. Grettum and Carol A. Grettum), Anderson and Grettum Partnership, and R. Allan Rostad, as an individual, and Thomas A. Richards as an individual. These parties to the quiet title action claimed no interest in the real property in their individual capacity and did not participate in the appeal to the Supreme Court of North Dakota. They were also represented by the Garaas Law Firm.

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PETITION FOR WRIT OF CERTIORARI

TAG Investments, James A. Grettum, Carol A. Grettum and Jonathan T. Garaas respectfully pray that a writ of certiorari issue to review three related judgments and opinions of the Supreme Court of North Dakota that deny Petitioners due process of law and equal protection of the law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States of America.

OPINIONS BELOW

The first opinion that gives rise to this petition is *Matrix Properties Corporation v. TAG Investments*, 2002 ND 86, 644 N.W.2d 601. This case is reprinted in Appendix at page 1 through 20 and will sometimes be referred to as MATRIX IV. By order of June 5, 2002, the Supreme Court of North Dakota denied a petition for rehearing. Appendix page 100 ["App. 100"].

The second opinion that gives rise to this petition is *Matrix Properties v. J.C.G. Investments, L.L.C.*, 2002 ND 99, ____ N.W.2d ___. App. 24-25. By order of July 15, 2002, the Supreme Court of North Dakota denied a petition for rehearing. App. 102. This case will be referred to as MATRIX V.

The third opinion that gives rise to this petition is *Matrix Properties Corporation v. TAG Investments*, 2002 ND 119, ___ N.W.2d ___. App. 39-41. This opinion was issued on July 16, 2002, by the Supreme Court of North Dakota and no petition for rehearing was made by petitioners. This case will sometimes be called MATRIX VI.

The first and third opinions that give rise to this petition stem from post-judgment proceedings in a specific performance action of an Option to Purchase dated October 14, 1996. App 334-351. Other Supreme Court decisions concerning this specific performance action are *Matrix Properties Corp. v. Tag Investments*, 2000 ND 88, 609 N.W.2d 737 (App. 51-64, and called MATRIX I); *Matrix Properties Corp. v. TAG Investments*, 2000 ND 213, 622 N.W.2d 432 (App. 67-68, and called MATRIX II); and *Matrix Properties Corp. v. TAG Investments*, 2001 ND 128, 636 N.W.2d 674 (App. 69-70, and called MATRIX III).

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the denial of the petitions for rehearing by the Supreme Court of North Dakota for the first two opinions subject to this petition – June 5, 2002 and July 15, 2002, respectively. App. 100, 102. The third opinion sought to be reviewed was decided by the Supreme Court of North Dakota on July 16, 2002, and this petition is made within 90 days of said decision.

The federal constitutional rights denied Petitioners were raised in the District Court and the Supreme Court of North Dakota in various post-judgment proceedings. App. 127-333. Among the federal authority relied upon by Petitioners in the appeals to the Supreme Court of North Dakota of the post-judgment damages awarded in the specific performance action were *Boddie v. Connecticut*, 401 U.S. 371 (1971) and *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422 (1982). The Supreme Court of North

Dakota rejected Petitioners' federal claims without discussion.

The federal constitutional rights denied Petitioners were also raised in the quiet title action before the District Court in response to a summary judgment motion, and in a timely post-judgment motion to amend the judgment. Petitioners' constitutional rights to due process of law and equal protection of the law were raised in the appeal to the Supreme Court of North Dakota. The North Dakota Supreme Court determined that Petitioners TAG Investments, Carol A. Grettum and their attorney Jonathan T. Garaas were frivolous to assert such rights. App. 25.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED IN THIS PETITION

Article 14, § 1, of the Articles of Amendment to the Constitution of the United States of America states:

> All persons born or naturalized in the United States, and subject to the jurisdiction, thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This petition brings into issue whether the protections of the following North Dakota statutes are being applied equally to the Petitioners:

North Dakota Century Code (N.D.C.C.) § 35-20-01:

35-20-01. Vendor's lien on real property for purchase authorized. One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise by the personal obligation of the buyer.

N.D.C.C. § 28-26-01 concerning attorney fees and is set out at App. 106.

N.D.C.C. § 28-05-07 concerning a Lis Pendens and is set out at App 106-107.

N.D.C.C. § 28-20-11 concerning when a judgment is notice to a purchaser is set out at App. 107.

N.D.C.C. § 47-14-05 concerning pre-judgment interest is set out at App. 110-111.

N.D.C.C. § 28-20-34 concerning post-judgment interest is set out at App. 108.

N.D.C.C. § 32-03-21 relating to damages for the "wrongful occupation" of real property is set out at App. 108.

N.D.C.C § 41-03-36(c) concerning the rights of an obligee when a check is dishonored by the obligor is set out at App. 109. The entire statute is found at App. 108-110.

This petition brings into issue whether the protections of the following North Dakota Rules of Civil Procedure (N.D.R.Civ.P.) have been denied Petitioners resulting in a denial of due process of law and a denial of equal protection of the law.

N.D.R.Civ.P. 6. App. 112-113.

N.D.R.Civ.P. 11(c). App. 113-116.

N.D.R.Civ.P. 52. App. 117-118.

N.D.R.Civ.P. 54(e). App. 118-120.

N.D.R.Civ.P. 59(j). App. 120-123.

N.D.R.Civ.P. 60. App. 123-125

N.D.R.Civ.P. 70. App. 125-126.

STATEMENT OF THE CASE

Petitioners assert, that in three related decisions and judgments, the Supreme Court of North Dakota has sanctioned a course of proceedings in the lower District Court that has deprived them of due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America. Although, a cursory review of the decisions that are the subject of this petition might lead a reader to believe that Petitioners are recalcitrant litigators, Petitioners state their positions in the North Dakota court system were designed to preserve their federally protected rights of freedom of contract, due process in court under the same procedures as afforded other litigants, and equal protection of the law.

To understand this Petition, the following case history is provided:

A. MATRIX I: the first appeal from the original Judgment of November 2, 1999.

The three judgments and opinions, subject to this Petition, stem from an Option to Purchase dated October 14, 1996, relating to 114 acres of real property in Fargo, North Dakota, between TAG Investments ("TAG") to

Matrix Properties Corporation ("Matrix"), then known as E.W. Wylie Corporation. App. 334. At the time the option was entered into, TAG did not own any of the real property but had option to purchase rights with the Clapp Family Trust, then record-title owner. See paragraph 8 of the Option to Purchase. App. 339. After the Option to Purchase was executed, TAG purchased only 51 acres of the possible 114 acres of land that was subject to the option.

By the terms of the option, Matrix was required to purchase 20 acres by June 1, 1999. App. 337. On May 26, 1999, Matrix gave notice to TAG that it was going to purchase the south 21.82 acres of the second tract of land – then owned by TAG. App. 53. Because TAG was not paid for at least 20 acres by June 1, 1999, (App. 337) TAG believed it was free of any obligations under the option to purchase. On June 22, 1999, TAG conveyed the 21.82 acres sought by Matrix in its initial exercise to James A. Grettum. James A. Grettum closed with Matrix on the 21.82 acres on June 28, 1999. After the closing, each had a different view of the effectiveness of the option to purchase. App. 54-55.

After the closing of June 28, 1999, the Clapp Family Trust deeded James A. Grettum the remaining 27 acres of the second tract of land without TAG acquiring any interest. Matrix gave notice to TAG and Grettum on July 1 and 2, 1999, respectively, of its intent to purchase the remaining portion of the real property. App. 55. On July 6, 1999, both TAG and James A. Grettum responded by letter indicating that they were free of further obligations under the option to purchase. App. 55.

On July 9, 1999, Matrix initiated a lawsuit against TAG and James A. Grettum. After TAG and James A.

Grettum answered, Matrix immediately moved for summary judgment on a single issue. As can be seen from the Memorandum Opinion of Judge Erickson, the last fact (in terms of date) submitted or relied upon in the summary judgment was the July 6, 1999, response of TAG and James A. Grettum to the July 1 and 2, 1999, notices from Matrix. App. 71-99.

The sole issue in the summary judgment motion was whether the June 28, 1999, closing with James A. Grettum had fulfilled Matrix's obligation to purchase 20 acres of land by June 1, 1999, to keep the option alive. Matrix did not submit any evidence of any attempted tender of performance concerning the July 1 and 2, 1999, letters to TAG and James A. Grettum. Matrix did not even present any evidence that it had any money on hand to close with respect to the July, 1999, notices. In its brief supporting its motion for summary judgment, the position of Matrix concerning the role of James A. Grettum was limited:

> To the extent that TAG has further transferred Option Property to Grettum, Grettum is obligated to convey the property to E.W. Wylie because he took the property subject to E.W. Wylie's rights under the Option Agreement. *Bangen v. Bartelson*, 553 N.W.2d 754, 758 (N.D. 1996).

Summary judgment was issued in favor of Matrix in that the lower court determined the June 28, 1999, closing with full payment within 45 days satisfied the obligation of Matrix to purchase 20 acres by June 1, 1999. On November 2, 1999, Judgment was issued decreeing in pertinent part: "Defendants' [sic] are ordered to specifically perform under the Option to Purchase dated October 14, 1996." App. 104. The lower court did not retain jurisdiction in the judgment.

On November 2, 1999, TAG and James A. Grettum appealed the November 2, 1999, Judgment to the Supreme Court of North Dakota resulting in the decision of *Matrix Properties Corporation vs. TAG Investments*, 2000 ND 88, 622 N.W.2d 432. Said decision affirmed the summary judgment of the lower court without remand other than to assess the presumed costs of the appeal of $75.00.

Neither TAG nor James A. Grettum sought a stay during the first appeal. One attempted closing by Matrix in December, 1999, was rejected by TAG as a counteroffer. Among other matters of deviation, Matrix had demanded more land to be conveyed to it than the option agreement provided. Although Matrix attempted to have TAG and James A. Grettum found in contempt because of an anticipated rejection, the lower court would not find said parties in contempt. No other attempt to close was made by Matrix while the first appeal was pending.

While the first appeal was pending, James A. Grettum quit claimed the north 27 acres of the second tract (the land he had received directly from the Clapp Family Trust) to his wife, Carol A. Grettum. The quit claim deed was dated in January, 2000, and placed of record in May, 2000. The quit claim deed trailed a post-judgment lis pendens placed of record in December, 1999, by Matrix. While the first appeal was pending, James A. Grettum felt compelled to transfer the 27 acres to his wife to preserve the family's estate, and to clearly delineate his separate duty under paragraph 11 of the option, as a previous optionee, with the duty he has under paragraph 8 of the option, as a grantee of the Clapp Family Trust. App. 339-340, 341. Under N.D.C.C. § 47-10-23.1, a nontestamentary transfer of real property between spouses is conclusively presumed

to be for consideration (unless stated in writing otherwise at the time of the transfer).

B. MATRIX II: the second appeal.

On June 7, 2000, the MATRIX I mandate of the Supreme Court of North Dakota was issued. It is after the mandate was issued in the first appeal, that TAG, James A. Grettum, Carol A. Grettum and their attorney, Jonathan T. Garaas, assert that their federal rights to due process of law and equal protection of the law were denied and violated by the North Dakota courts in a series of post-judgment motions, and a quiet title action, that ultimately lead to the decisions sought to be reviewed by this Petition.

On June 2, 2000, Matrix proposed a new closing for June 21, 2000. At this time, TAG believed that the July 1 and 2, 1999, notices were ineffective due to the rejected December, 1999, counteroffer during the first appeal, and more than 45 days had passed since the notice of entry of the November 2, 1999, Judgment. Further, since the option agreement required at least *40 acres* to be "purchased" (App. 337) by June 1, 2000, and payment of option monies on February 28 of each year for land not "purchased" the previous year based on a formula of land "not yet been deeded" (App. 337-339), TAG inquired of Matrix of its position on said option provisions and gave notice that February 28 option monies were delinquent. App. 166. Matrix responded by bringing a motion on nine days mailed notice (at the time, N.D.R.Civ.P. 6 required 14 days notice plus 3 days for mailing) asking that the lower court declare that Matrix had no requirement to pay the option monies that had been due in February, 2000. While this

motion was pending, the City of Fargo, North Dakota experienced a natural disaster (massive rainfall) inundating Grettum's office and the Garaas Law Firm's office with six feet of sewage – exasperating the shortened notice.

The post-judgment motion of Matrix resulted in the lower court's Order of June 26, 2000, which held the February option monies did not need to be paid because " . . . Plaintiff's valid and timely exercise of the option in July 1999 created a binding executory contract for the purchase and sale of real property as found by prior Order of this Court." App. 65-66.

The Order of June 26, 2000, was appealed by TAG and James A. Grettum because they believed: (a) the lower court no longer had jurisdiction because there was no remand other than to assess costs of appeal; (b) there was no prior finding in either the November 2, 1999, Judgment or the Memorandum Opinion of October 27, 1999, that expressly held that the July, 1999, notices created a binding executory contract, and the order amends the final judgment contrary to the rules of civil procedure; (c) based upon the terms of the option agreement, the February, 2000 option monies were due even if there was an executory contract because the word "purchased" contemplated a completed contract; and (d) their right to due process was violated based upon the shortened notice, the claimed amendment of a final judgment, and a belief that Matrix must present the issue in a new lawsuit – not a post-judgment motion unsupported by evidence.

On December 12, 2000, the Supreme Court of North Dakota, summarily affirmed the June 26, 2000, Order (MATRIX II) and TAG and James A. Grettum were determined to be frivolous to expect contractual option monies

to be paid after the November 2, 1999, Judgment. Double costs for the appeal (presumptively $150.00) were awarded to Matrix. Although not an issue of the second appeal, the Supreme Court of North Dakota inexplicably modified the remedy afforded Matrix by the November 2, 1999, Judgment (supposedly "final") so as to provide the following order:

> We further direct the district court to order specific performance requiring TAG and Grettum to convey the subject property upon tender by Matrix of the purchase price set in the 1996 option agreement.

App. 68.

Believing the Supreme Court of North Dakota misidentified the issues on appeal, TAG and James A. Grettum timely petitioned the Supreme Court of North Dakota for rehearing which was denied on February 5, 2001.

C. Court proceedings during second appeal.

The second appeal was pending in the Supreme Court of North Dakota from the Notice of Appeal dated July 3, 2000, until the issuance of the mandate on February 19, 2001. No party sought a stay during the second appeal.

In early July, 2000, Matrix moved the lower court to require TAG and James A. Grettum to provide deeds for the real property, or alternatively, declaring the judicial transfer of the property. Matrix's motion of July, 2000, set forth the novel concept that all of the proceeds of the closing would be first used to exercise the underlying Option to Purchase with the Clapp Family Trust (not part of the prior litigation) and all remaining proceeds were to

be held by the court pending resolution of a subsequent motion to be made by Matrix for damages and attorney fees. TAG and James A. Grettum responded to said motion claiming, in part, it was inconsistent with the contract and Judgment. Because of the second appeal, the lower court declined to hear the July, 2000, motion made by Matrix.

Because of the lower court's declination to entertain the July 2000, motion, Matrix brought a Motion for Supervisory Writ before the Supreme Court of North Dakota asking the Supreme Court of North Dakota to rule that the lower court could enforce the November 2, 1999, Judgment despite the second appeal. The Supreme Court of North Dakota denied Matrix's motion, but indicated that the lower court retained jurisdiction to enforce a judgment when no stay pending appeal had been granted. App. 4.

On October 23, 2000, Matrix brought a Motion for an Order Compelling Defendants to Provide Deeds to Plaintiff, or Alternatively, Declaring the Judicial Transfer of Property to Plaintiff. Matrix's motion was not supported by any evidence. As set forth in the Brief of Matrix in support of its motion, the following was requested of the lower court:

> "Plaintiff also seeks an Order placing the proceeds of the purchase into the Court. These funds will first be used to exercise the Underlying Option [meaning TAG's option with the Clapp Family Trust], and second to be held by the Court pending resolution of Plaintiff's motion for damages and attorneys' fees. These damages and fees will include not only reimbursement for the damages from the delay in transferring the property from July 1, 1999, to the time of transfer,

> but will also include any fees and costs incurred in clearing up the title interests of the Clapp Land Trust, JCG Investments, L.L.C., Anderson and Grettum Investments, a partnership under the laws of the State of North Dakota, R. Allan Rostad, individually, and Thomas Richard, individually. Any remaining funds would be paid to defendants or their designated intermediary."

The October 24, 2000, motion was resisted by TAG and James A. Grettum with a comprehensive affidavit from James A. Grettum setting forth their position that (a) Matrix was not enforcing the Judgment, but attempting to amend it, and (b) that Matrix was not following the Option to Purchase, and was in default. TAG and James A. Grettum's position, which essentially remained unchanged since the entry of the November 2, 1999, Judgment was that if the option agreement was in effect that they would honor it, but they would reject any deviation from its terms. James A. Grettum advocated that his sole responsibility under the Judgment, and the option agreement, was to provide a quit claim deed, as a previous optionee, under paragraph 11 of the option agreement. App. 341. TAG advocated that if a contract to sell was formed by the initiation of the lawsuit, then TAG's duties to Matrix were limited by provisions in paragraph 13 of the option:

> If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its

> exercise of the Option Agreement void as to the Individual Parcel selected or to declare the entire Option Agreement void.

App. 343.

TAG advocated that the words "no obligation" meant that TAG had no financial obligation to correct its title. TAG advocated that it had no financial obligation to pay for and obtain title from either the Clapp Family Trust, the record title owner of the first tract, or Carol A. Grettum, then record title owner of the second tract. When TAG's interest in the underlying option terminates, the Clapp Family Trust, or any one standing in the shoes of the Clapp Family Trust, has the obligation to convey to Matrix under the same terms stated in Matrix's option agreement with TAG. See paragraph 8 of the Option to Purchase at App. 339-340.

TAG advocated that if a contract to sell exists, TAG is entitled to statutory interest on its contract. TAG submitted that if a contract to sell was created, and Matrix did not want to accept, nor perform, the contract that was formed, Matrix had either abandoned the contract to sell or forfeited its right to specific performance. TAG submitted that it should be relieved of its judgment burden due to Matrix's noncompliance with the Option to Purchase.

On November 7, 2000, the lower court determined that it did not need to consider any fact because it was a post-judgment motion, and therefore, the lower court refused to consider the unchallenged facts, submitted by TAG and James A. Grettum, establishing Matrix's noncompliance with the Option to Purchase. On November 8, 2000, the lower court ordered both TAG and James A. Grettum to execute a warranty and quit claim deed, and

obtain quit claim deeds from non-parties, and deliver all of the deeds to Matrix on November 15, 2000. The order of November 8, 2000, further provided "There being no just reason for delay, **LET JUDGMENT BE ENTERED ACCORDINGLY FORTHWITH.**" On November 15, 2000, only hours before the ordered time for delivery of the deeds, Matrix served the attorneys for TAG and James A. Grettum with the order. No judgment has ever been entered pursuant to said order of November, 2000.

Because of the amendment of the judgment while on appeal and the unprecedented legal position taken by the lower court that a factual hearing was not necessary to resolve facts that occurred subsequent to November 2, 1999 – the date of the original Judgment, now supposedly final – TAG and Grettum sought a Supervisory Writ from the Supreme Court of North Dakota, which was denied without comment. For this reason, TAG and Grettum believed it was necessary to attempt to have the United States District Court assume jurisdiction in an attempt to protect themselves from their perceived violations of due process of law, equal protection of law, and other civil rights. TAG and Grettum' s petition for removal to Federal Court was denied, orally, on December 15, 2000, shortly after the Supreme Court of North Dakota's decision of December 12, 2000, in MATRIX II.

After federal removal was denied on December 15, 2000, TAG and James A. Grettum appealed the November 8, 2000, order (that still had not been reduced to the amended judgment) to the Supreme Court of North Dakota.

On December 15, 2000, only hours after the federal judge orally denied removal, TAG and James A. Grettum

were faced with a proceeding in the State of North Dakota's lower court. During said proceeding, District Judge Frank Racek informed the parties: "As to the Carol Grettum property. You are going to have to commence an action against her because I can't order her to do anything." Transcript of Hearing of December 15, 2000, at page 29, line 25, to page 30, line 2.

On January 2, 2001, a pre-motion status conference was held without any prior indication to TAG or James A. Grettum as to the reason for the pre-motion status conference. On January 2, 2001, the State's lower court judge again informed Matrix of his position concerning Carol A. Grettum's interest in the north 27 acres of Tract 2: "the third piece, Carol Grettum, the Court is not going to do anything for you unless you get her in front of the Court somehow." Transcript of Proceeding of January 2, 2001, at page 17, lines 6 through 8.

On January 5, 2001, the lower court did not follow through with what had earlier been verbally stated would occur. On January 5, 2001 (before the mandate stemming from the December 12, 2000, Supreme Court decision of MATRIX II was issued, and without a fact-finding hearing), the lower court ordered a conveyance that included a judicial transfer of non-party Carol A. Grettum's land (27 acres) and an abatement of the purchase price to TAG ($202,872) so the obligation of payment to obtain the Clapp Family Trust title fell upon TAG – not Matrix. The lower court, without comment, explanation or findings, did not require Matrix to pay interest on the purchase price (statutorily fixed at 6%, or 12% if by judgment). On January 5, 2001, Matrix tendered three separate personal checks, but the mode of payment and the amount of payment were rejected by TAG through its attorney.

Despite the objection to the personal checks, the lower court ordered Matrix to send, by mail, the three personal checks to TAG's attorneys. One of the checks sent is Matrix's personal check in the amount of $254,830.58 made payable to TAG, James A. Grettum and Carol A. Grettum.

Judge Racek, the lower court judge issuing the January 5, 2001, Order, recused himself for being biased *for events occurring on January 2, 2001, and earlier,* and the matter was assigned to Judge Georgia Dawson. Intending to appeal the January 5, 2001, Order, and not wanting to be found accepting the benefit of the Order, TAG and James A. Grettum brought a motion asking Judge Dawson to have the checks issued by Matrix on January 5, 2001, placed with the lower court in an interest-bearing account. The motion was denied, even though not resisted by Matrix. TAG and James A. Grettum further moved to have all orders issued by the recused judge vacated because of lack of jurisdiction. This motion was denied by Judge Dawson.

On February 7, 2001, The Supreme Court of North Dakota dismissed the appeal from the lower court's order of November 8, 2000, in that it was an order for judgment, and accordingly interlocutory, and not appealable in the absence of entry of the amended judgment.

D. MATRIX III: an appeal of the January 5, 2001, Order.

TAG appealed the January 5, 2001, Order presenting several issues on appeal. The first issue presented by TAG and James A. Grettum was that the lower court did not have jurisdiction to amend the November 2, 1999, Judgment

while the appeal was pending (MATRIX II), and without an evidentiary hearing as to post-judgment facts. TAG and James A. Grettum claimed the order deviated from the terms of the Option to Purchase and the Supreme Court of North Dakota's prior decisions and mandates, in many respects, including the following:

1. The 45 day "time of the essence rule" was obliterated.

2. The parties were different. The Order of January 5, 2001, included Carol A. Grettum without proper amendment of pleadings, and without proper service of any notice to her.

3. James A. Grettum's involvement in the initial Judgment was merely to give a quit claim deed only based upon his option rights existing prior to October 14, 1996. The original Judgment did not require him to convey the real property interest he later received directly from the Clapp Family Trust and conveyed to Carol A. Grettum post-judgment.

4. The decision of December 12, 2000, required a tender by Matrix – not the proffered conditional tender of the personal check in an insufficient amount.

In said appeal TAG and James A. Grettum asserted that they were denied due process of law because the lower court refused to consider any post-judgment fact presented to it by TAG and Grettum. Citing *Powell v. State of Alabama*, 287 U.S. 45 (1932), TAG and James A. Grettum claimed the lower court acted arbitrarily when it issued the January 5, 2001, Order without an evidentiary hearing as to post-judgment facts. TAG and James A. Grettum argued that they were denied equal protection of

the law and access to the court for its refusal (a) to hear uncontroverted post-November 2, 1999, facts presented by TAG and James A. Grettum, (b) to follow clear contractual terms, or (c) giving TAG the benefit of certain North Dakota statutes such as being paid interest on the purchase price.

Citing case law from other states, such as *Shallow Brook Associate v. Dube*, 599 A.2d 132 (N.H. 1991), TAG argued in said appeal, that it should be relieved of its obligations under the November 2, 1999 Judgment because Matrix did not timely and unconditionally tender performance. In said appeal, TAG informed the Supreme Court of North Dakota of case law from other states, such as *Bellamah v. Schmider*, 360 P.2d 656 (N.M. 1961), that the purchase price should not have been abated because Matrix knew that TAG did not have full title when it initiated its lawsuit.

Despite each issue raised in the appeal by TAG and James A. Grettum having support in post-judgment facts, North Dakota statutory law and North Dakota case law, or case law from other jurisdictions, the Supreme Court of North Dakota, on July 13, 2001, summarily affirmed the January 5, 2001, Order finding the appeal frivolous and determined by the prior two appeals and assessed double costs (presumed $150.00). MATRIX III; App. 70. A timely petition for rehearing was denied on September 4, 2001.

E. MATRIX IV: Matrix's post-judgment motion for damages.

In March, 2001, Matrix brought a post-judgment motion for damages "caused by defendants refusal to convey property." The motion did not identify the rule or

statute upon which it was based. The motion was supported factually by only the affidavit of Matrix's attorney, Sidney J. Spaeth, setting forth attorney fees, costs and expenses Matrix had incurred post-November 2, 1999, and copies of various post-judgment documents, including letters, opinions, orders, and Defendants' payment calculations.

The motion was supported by a legal brief claiming damages for the "delay in the transfer of the property from August 15, 1999, to January 4, 2001." Matrix cited N.D.C.C. § 32-03-21 as the statutory authority for its motion for its claim of damages, post-judgment expenses and post-judgment costs. Matrix did not present any factual basis for its claimed damages. Matrix's position was that since TAG had sought statutory interest on the purchase price, Matrix should have statutory interest on the liquidated value of the land set forth in the option contract from August 14, 1999 (the date Matrix claimed the closing should have occurred) to January 4, 2001.

In the motion, Matrix sought all post-judgment attorney fees from May 5, 2000 to the date of the motion in March 2001. The attorney fees Matrix sought included its attorney fees for the second appeal (MATRIX II) and its denied request for a supervisory writ even though the mandate did not authorize the attorneys fees. Matrix's claimed basis for the attorneys fees was N.D.C.C. § 28-26-01.

TAG's position was: (a) there was no procedural or statutory basis for the motion to amend the November 2, 1999, specific performance Judgment to include damages; (b) Matrix was not entitled to damages because the earliest that Matrix could claim even a conditional tender was

January 5, 2001, and under the option contract TAG was entitled to possession until paid; (c) under N.D.C.C. § 32-03-21, if Matrix was entitled to damages it would be rentals offset by interest on the unpaid purchase price; and (d) all four mandatory elements of N.D.C.C. § 28-26-01(2) were missing in the post-judgment motions.

The hearing on the motion was postponed because of the pending appeal of the January 5, 2001, Order. After the Supreme Court of North Dakota summarily affirmed the appeal from the January 5, 2001, Order (MATRIX III), Matrix renewed and amended its motion for damages. Even though the mandate of the Supreme Court of North Dakota authorized only double costs for the appeal of the January 5, 2001, Order, Matrix amended its motion to request the attorney fees incurred by Matrix for said appeal.

A motion hearing was held on August 27, 2001, before Judge Dawson. Matrix presented no evidentiary facts for its claimed damages stemming from the claimed delay, offering only the musings of its attorney, Sidney J. Spaeth. Attorney Spaeth stated in part, "Defendants' [sic] contend that it's [sic] farm land; that is wrong. This is development property, damages are measured by the delay in the development of the property." Transcript of Hearing of August 27, 2001, at page 6.

After listening to the arguments of both counsel, Judge Dawson awarded Matrix all of the damages, costs, expenses and attorneys fees Matrix had requested. TAG and James A. Grettum, through their attorneys, asked Judge Dawson if she could identify the statutory and legal basis for her decision. Judge Dawson replied, "No." App. 208-209. When asked if the judge was just unwilling to

answer or if there was not a basis for her decision, Judge Dawson did not identify the legal basis for her decision, but elaborated in part, "Well, we'll call it the press of business – whatever you want to call it." App. 209.

On August 27, 2001, without findings of fact, Judge Dawson signed a post-judgment order authorizing the entry of a monetary judgment totaling $188,636.79. App. 21. The post-judgment monetary judgment was entered on September 11, 2001. App. 23. TAG and James A. Grettum timely appealed said judgment to the Supreme Court of North Dakota. TAG and James A. Grettum argued that the award of damages was based on a mere fiction because Matrix had not performed, or even tendered performance, on August 15, 1999. TAG and James A. Grettum contended that the September 11, 2001, Judgment was an unprecedented post-judgment monetary judgment entered without proper pleadings, trial, evidence, factual findings, legal conclusions and jurisdiction, all in violation of TAG and James A. Grettum's right to due process of law, and was void. App. 6.

This appeal resulted in MATRIX IV. App. 1-20. In paragraph 26 of MATRIX IV (App. 14), the Supreme Court of North Dakota determines that it is the law of the case that Matrix unconditionally complied with the option and made reference to paragraphs 1, 14-18 of the first appellate decision (MATRIX I). App. 51-64. These referenced paragraphs refer to the exercise of twenty acres by Matrix in May, 1999, with a June, 1999, closing and do not refer to the subsequent exercise of July, 1999, by Matrix which has never been the subject of any judicial scrutiny. App. 57-59.

When read together, paragraphs 14 and 16 of the subject Option to Purchase clearly provide that TAG has possession until fully paid at closing. App. 343-345. Despite such contract provisions, the Supreme Court of North Dakota – not the trial court – factually determined that TAG's occupation was an "unlawful possession" after August 15, 1999, even though the earliest that Matrix could claim that TAG had been paid any monies was January 5, 2001. App. 17.

Although reducing the amount of the judgment, the Supreme Court of North Dakota determined that jurisdiction to enter the monetary judgment for costs, attorney fees, and legal damages was proper under the court's ancillary jurisdiction to enforce the November 2, 1999, Judgment and N.D.R.Civ.P. 70. App. 12.

F. MATRIX V: the quieting title action.

In April, 2001, without naming TAG, James A. Grettum, or Carol A. Grettum, Matrix initiated a quieting title action against the entities and individuals who had promised, in paragraph 11 of the underlying option, to quit claim their interest as previous optionees. Matrix also named persons unknown as additional defendants. See caption; App. 26.

At the time the quieting title action was started, none of Matrix's three checks issued on January 5, 2001, had been cashed by TAG. TAG could not cash said checks because of its pending appeal from the January 5, 2000 Order.

Believing the quieting title action premature, TAG and Carol A. Grettum answered as "unnamed" defendants

along with the named defendants. TAG and Carol A. Grettum asserted the January 5, 2001, Order was void, or voidable, and that an order could not be used as a root in a chain of title and did not vest any real property in Matrix. TAG and Carol A. Grettum asserted that if the January 5, 2001, Order was not void or voidable, they had at least a vendor's lien until fully paid under N.D.C.C. § 35-20-01.

In July, 2001, after the January 5, 2001, Order was summarily affirmed by the Supreme Court of North Dakota (MATRIX III), TAG cashed two of the three checks sent to it from the January 5, 2001, proceeding. The $254,830.58 made payable to TAG, James A. Grettum and Carol A. Grettum was not cashed.

On September 25, 2001, Matrix moved for summary judgment against TAG and Carol A. Grettum coupled with Rule 11 motion for sanctions "based upon defendants' assertion of right, title and interest to the property subject to this action, even though defendants can assert no right, title or claim to real property through any evidence or valid legal claim . . . "

Resisting the motion, TAG submitted the affidavit of its partner, James A. Grettum, stating TAG has only been partially paid. Carol A. Grettum submitted her affidavit that she had not been paid any monies for her land. Carol A. Grettum was then record title owner of 27 acres. Resisting summary judgment, both TAG and Carol A. Grettum relied on the North Dakota case of *Wagner v. Stroh*, 294 N.W. 195 (N.D. 1940) which held that a court of equity would not entertain a vendee's quiet title action against his vendor until the vendor is paid. TAG and Carol A. Grettum further asserted that the January 5, 2001, Order would not support a claim of *res judicata* because it was an

order made without hearing and factual findings, and Carol A. Grettum was not a party to the specific performance action.

During oral arguments, Matrix, through its attorney, acknowledged that it had stopped payment on the $254,830.58 check. App. 211-212. Despite Matrix's concession, the lower court issued summary judgment and specifically held that Carol A. Grettum had been paid by Matrix's dishonored check. App. 30. When ordering summary judgment, the lower court, without invitation of any party and without notice to any party, took judicial notice of the specific performance action – but making errors in the recitation of the other case.

Despite Matrix's admission that the $254,830.58 check had been dishonored, the lower court sanctioned TAG and its attorney for submitting a defense to the summary judgment motion and shifted all attorney fees and costs incurred by Matrix in the quiet title action to them. App. 31, 33.

The lower court, not adopting Matrix's expressed position for Rule 11 sanctions, misstated a paragraph in the Answer, and assessed attorney fees without affording TAG or its legal counsel, Jonathan T. Garaas, an opportunity to explain the questioned paragraph of the Answer.

A timely Motion to Alter, Amend, or Vacate the Judgment of November 14, 2001 was made and denied. TAG, Carol A. Grettum and their attorney submitted, in part, that the Judgment was contrary to the Due Process and Equal Protection rights guaranteed by the Fourteenth Amendment to the Constitution of the United States of America. App. 293-316; argument also made to lower court. Legal counsel Jonathan T. Garaas and TAG complained that

they did not get a fair hearing on the sanctions. App. 293-316. Petitioners supported their post-judgment motion with Matrix's position in the specific performance action wherein Matrix said that Carol A. Grettum was not intended to be paid by Matrix when it issued the check for $254,830.58. The lower court denied Petitioners' post-judgment motions. App. 37-38.

All Petitioners, herein, timely appealed the Judgment and post-judgment order to the Supreme Court of North Dakota, raising among other matters, the constitutional issues presented herein. Despite knowledge of the dishonored check of $254,830.58, the Supreme Court of North Dakota determined Petitioners' appeal was frivolous and assessed attorney fees for the appeal against them in the amount of $5,000.00. The appellate decision holds, without explanation, that under the facts of the case TAG and Carol A. Grettum do not have a vendor's lien. App. 25.

G. The Third Judgment in the specific performance action.

After Matrix obtained the post-judgment monetary judgment of $188,636.79, it stopped payment on the $254,830.58 check. Matrix then brought a motion to offset the September 11, 2001, Judgment with an implicit, and unknown, monetary judgment for about $880,000 obtained by Defendants on November 2, 1999. App. 223. TAG and James A. Grettum resisted the motion asserting, in part, that the September 11, 2001, monetary judgment was void. App. 225. TAG further asserted that it was entitled to statutory interest on the implicit November 2, 1999, Judgment, as revisited by the Supreme Court of North Dakota on December 12, 2000 (MATRIX II). App. 226.

Carol A. Grettum, after the judge in the quieting title action told her that she had been paid by the dishonored check, moved to intervene and direct the $254,830.58 payment to her. The lower court denied Carol A.Grettum the right to intervene. App. 42-43. On November 27, 2001, the lower court ordered offset determining Matrix need only pay TAG. App. 42-43. Subsequent to said order, under the guise of entering a cost judgment of $450.00 in favor of Matrix (stemming from the prior appeals), the lower court, without further proceedings to TAG, authorized a third judgment by post-it note in the singular specific performance action. App. 44. The third judgment in the singular case raised the January 5, 2001, Order to judgment status. App. 45.

TAG and Grettum appealed from the order of offset and the third judgment. TAG and Grettum again asserted that the September 11, 2001, monetary judgment was issued without due process of law and is void. The Supreme Court summarily affirmed the order and judgment without discussion of the constitutional issues. (MATRIX VI.) App. 40.

H. Application of the Fourteenth Amendment.

The basic elements of due process of law include a court having jurisdiction, reasonable notice to the parties, and a meaningful opportunity to be heard. It is respectfully submitted that all three elements were missing when the September 11, 2001, Judgment was entered. A court's jurisdiction in a specific performance action is limited by the Fourteenth Amendment. No court has the province, when specifically enforcing a contract, to alter the clear

terms of that contract. *Biteler's Tower Service v. Guderian*, 466 N.W.2d 141, 144 (N.D. 1991). In this case, the underlying option agreement clearly provided that TAG would have possession until paid. App. 345. Yet the Supreme Court of North Dakota altered the contract, and made factual findings of an unlawful possession by TAG. App. 17. The lower court – the court that should find facts – did not make a factual finding that TAG's possession was unlawful. App. 21-22. MATRIX IV and MATRIX VI establish that TAG had not been fully paid. App. 19, 20 and 40. Petitioners are denied due process of law and equal protection when damages are based upon appellate factual findings (not the trial court's findings) that TAG's possession until January 5, 2001 was unlawful when the underlying contract allows TAG possession until fully paid. Due process of law is denied a litigant by invoking a "law of the case" argument when the judicial record establishes that factual matters that are claimed under said doctrine **were never litigated.**

Protections found in the North Dakota Rules of Civil Procedure have been denied Petitioners. Under certain circumstances, N.D.R.Civ.P. 70 authorizes "costs" but does not authorize attorney fees and expenses, nor legal damages. Said rule cannot be used as the basis for an unprecedented post-judgment motion for money damages in a specific performance action made without proper pleadings, discovery, trial, and judicial decisions based upon the evidentiary record. The monetary judgment amends the November 2, 1999, Judgment (App. 104); is inconsistent with N.D.R.Civ.P 52, 59 and 60, and due process of law; and should be considered void. *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965).

The North Dakota courts took Carol A. Grettum's real property while claiming she has been paid by a dishonored check. Not only has Carol A. Grettum been denied payment, she has been denied rights to enforce payment through a statutory vendor's lien as well as her day in court to protect her property. Upon delivery of a deed, a grantee no longer has privity with her grantor. *Bismarck Public School District No. 1 v. Hirsch*, 136 N.W.2d 449 (N.D. 1965). *Postal Telegraph Cable Company v. City of Newport, Kentucky*, 247 U.S. 464, 474-475 (1918). Although Carol A. Grettum may be bound by MATRIX I, she should not have been bound by the January 5, 2001, Order because she was not made a party to the specific performance action, and she was denied intervention. None of the Petitioners should have been sanctioned for advocating due process rights expressed in the North Dakota Rules of Civil Procedure and statutes.

REASONS FOR GRANTING THE WRIT

The North Dakota Supreme Court, and its inferior courts, have failed to remember the role of the judiciary announced in *Baltimore & Ohio Southwestern Railway Company v. Voigt*, 176 U.S. 498, 505 (1900) that "the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts . . . " After establishing an adjudicatory procedure presumptively complying with the Due Process Clause of the Fourteenth Amendment, the North Dakota courts denied Petitioners' basic rights in unprecedented procedures and took away real property and contract rights from Petitioners.

The procedures implemented by the North Dakota courts are in direct conflict with the protections of the Fourteenth Amendment and the civil rights of Petitioners whose real property, monies, and contract rights have been judicially taken by actions tantamount to spoliation. When voicing objection, Petitioners, and their attorney, have been sanctioned without a fair hearing, nor legal or factual basis, in order to keep them quiet.

Certiorari is appropriate to restore the Rule of Law in North Dakota, or in any other jurisdiction that seeks to exceed its authority to benefit a favored party.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

TAG INVESTMENTS, JAMES A. GRETTUM,
CAROL A. GRETTUM, and JONATHAN T. GARAAS,

Petitioners,

v.

MATRIX PROPERTIES CORPORATION,
a MINNESOTA CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of North Dakota

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I, PAGES 1 TO 170

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Filed 5/17/02 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 86

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

No. 20010228

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Georgia Dawson, Judge.

AFFIRMED, MODIFIED AND REMANDED.

Opinion of the Court by Maring, Justice.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for defendants and appellants.

Matrix Properties Corp. v. TAG Investments

No. 20010228

Maring, Justice.

[¶1] TAG Investments and James Grettum ("TAG") appealed from a post-judgment order awarding Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, ("Matrix") $4,127.60 in costs, $48,642 in attorney fees, and $135,867.19 in damages for delay in conveying real property. We affirm the award of costs and attorney fees, and we modify the time for awarding damages for delay in conveying the land and remand for recalculation of those damages.

I

[¶2] This is the fourth reported appeal emanating from an action by Matrix against TAG for specific performance of an October 14, 1996 agreement granting Matrix an option to purchase real property from TAG. In this appeal, TAG argues there is no procedural or statutory basis, including jurisdiction, for this money judgment, and the judgment is void or voidable. TAG also argues judicial estoppel bars Matrix from asserting inconsistent prejudgment and post-judgment positions, Matrix was only entitled to costs allowed by law, Matrix was not entitled to damages for loss of use of the property, and Matrix was not entitled to attorney fees. Our analysis of the issues raised by TAG requires a brief outline of the prior proceedings.

[¶3] In *Matrix Properties Corp. v. TAG Investments*, 2000 ND 88, 609 N.W.2d 737 (*Matrix I*), we affirmed a November 2, 1999 summary judgment granting Matrix specific

performance of the option agreement. We held Matrix timely and unconditionally complied with the option agreement in early July 1999. *Id.* at ¶ 1. We rejected TAG's claims that Matrix did not precisely comply with the option's notice requirement, or allow the abstract to be procured in the manner called for in the option. *Id.* at ¶¶ 9-13. We also rejected TAG's claim that Matrix failed to comply with the option by not tendering the purchase money before the option deadline expired. *Id.* at ¶ 18. We concluded the term "purchase" did not require a tender of money, and the tender of the purchase price was an incident of performance, not a condition precedent to the exercise of the option. *Id.* at ¶¶ 14-18. We also concluded that, although the option to purchase had several contingencies regarding the sufficiency of TAG's title, an objective standard governed those contingencies and Matrix had a good faith duty to raise only reasonable objections to TAG's title. *Id.* at ¶¶ 23-24. We concluded that Matrix could not rescind the option at its whim, and the option was not conditional or illusory. *Id.* at ¶ 24.

[¶4] After our decision in *Matrix I*, Matrix sought an order declaring it was not obligated to make any additional option payments to TAG in 2000 to retain rights under the option. In a June 26, 2000 order, the trial court granted Matrix's motion, concluding "pursuant to the terms of the 1996 Option Agreement, [Matrix] is not obligated to make any Option Payments to [TAG] to retain rights under the Option Agreement and that [Matrix's] valid and timely exercise of the option in July of 1999 created a binding executory contract for the purchase and sale of real property." TAG simultaneously appealed to this Court and applied for a supervisory writ, claiming the trial court exceeded its jurisdiction, the order amended a final

judgment that had been affirmed on appeal, the trial court did not have subject matter or personal jurisdiction to amend the judgment, the order was issued without due process and was in the nature of a declaratory judgment without service of a summons and complaint, and the hearing was conducted without proper notice.

[¶5] Meanwhile, on July 5, 2000, Matrix sought an order compelling TAG to provide Matrix with deeds for the property, or declaring the judicial transfer of the property to Matrix. On September 1, 2000, Matrix applied to this Court for a supervisory writ, asking us to clarify that the trial court retained jurisdiction to enforce the judgment despite TAG's pending appeal of the June 26, 2000 order. On September 25, we denied Matrix's application, indicating a trial court has continuing jurisdiction to enforce a judgment when no stay pending appeal has been granted.

[¶6] On October 24, 2000, Matrix again moved for an order compelling TAG to provide Matrix with deeds for the property, or declaring the judicial transfer of the property to Matrix. On November 8, 2000, the trial court ordered the judicial transfer of the property to Matrix on November 15. According to counsel for Matrix, counsel for TAG notified Matrix that TAG would not appear at the November 15 closing, and that TAG questioned the trial court's jurisdiction and raised a due process issue. TAG did not appear at the November 15 closing. On November 16, TAG asked this Court to vacate the November 8 order. We denied TAG's request on November 22, and on November 24, Matrix moved for an order judicially transferring the property. On December 6, 2000, TAG sought to remove the proceeding to the federal district court for North Dakota, and the federal district court remanded the case to state court on December 21.

[¶7] In the interim, on December 12, 2000, in *Matrix Properties Corp. v. TAG Investments*, 2000 ND 213, 622 N.W.2d 432 (*Matrix II*), we summarily affirmed the trial court's June 26, 2000 post-judgment order under N.D.R.App. 35.1(a)(1), and we awarded Matrix double costs under N.D.R.App. 38 and 39. On December 21, the trial court ordered TAG to appear on January 5, 2001, to convey the property. On January 5, the trial court ordered conveyance of the land to Matrix under N.D.R.Civ. 70. TAG moved to vacate the January 5 order as improperly modifying the November 2, 1999 summary judgment. On February 16, the trial court denied TAG's motion to vacate the January 5 order, and [TAG] appealed from the November 8, 2000 order, the January 5, 2001 order, and the February 16, 2001 order. On July 13, 2001, we summarily affirmed those orders under N.D.R.App. 35.1(a)(1) and (7), and we awarded Matrix double costs under N.D.R.App. 38 and 39. *Matrix Properties Corp. v. TAG Investments*, 2001 ND 128, 636 N.W.2d 674 (*Matrix III*).

[¶8] Meanwhile, in a March 26, 2001 motion, Matrix sought costs, attorney fees and damages incurred because of TAG's refusal to convey the property. The trial court continued Matrix's motion until after our decision in *Matrix III*. Matrix thereafter filed an amended motion, seeking litigation costs and attorney fees incurred after this Court's decision in *Matrix I*, and damages caused by TAG's refusal to convey the property from August 15, 1999, the date of the earliest possible closing under the option agreement, to January 5, 2001, the date the trial court ordered the transfer of the property to Matrix. The trial court awarded Matrix $4,127.60 in costs, $48,642 in attorney fees, and $135,867.19 in damages for loss of use of the property. TAG appealed.

II

[¶9] TAG argues there is no procedural or statutory basis, including jurisdiction, for this money judgment, and it is void or voidable. TAG argues Matrix's motion

> was an unprecedented post-judgment motion for damages in a specific performance action in which a final judgment had been entered almost two years earlier. Neither Matrix, nor the lower court, identified the legal basis for the unprecedented award of "costs," "damages," and "attorney fees" two years after a final judgment had been entered. The post-judgment motion procedure sanctioned by the lower court utterly denied TAG and Grettum their right to proper pleadings notifying them of the issues of the lawsuit, discovery, trial of issues of fact and a judicial decision based upon properly introduced evidence considered in light of the law. In other words, TAG and Grettum were denied due process of law.

[¶10] In an action for specific performance, a purchaser may recover damages from a seller for delay in conveying real property and the costs, if any, of recovering possession of the land. *See* N.D.C.C. § 32-03-21; *Bumann v. Maurer*, 203 N.W.2d 434, 438 (N.D. 1972); *Orfield v. Harney*, 33 N.D. 568, 579-81, 157 N.W. 124, 127 (1916); *Beddow v. Flage*, 22 N.D. 53, 60, 132 N.W. 637, 640 (1911); *Mitchell v. Knudtson Land Co.*, 19 N.D. 736, 744, 124 N.W. 946, 950 (1910). *See generally*, Annot., *Special or Consequential Damages Recoverable, On Account of Delay in Delivering Possession, by Purchaser of Real Property Awarded Specific Performance*, 11 A.L.R. 4th 891 (1982); Annot., *Specific Performance: Compensation or Damages Awarded Purchaser for Delay in Conveyance of Land*, 7 A.L.R. 2d

1204 (1949); 71 Am. Jur. 2d *Specific Performance* § 236 (2001).

[¶11] In *Cokins v. Frandsen*, 136 N.W.2d 377, 380 (N.D. 1965), however, we said a judgment on the merits is conclusive between the parties, not only as to every matter that was litigated but also as to every matter arising out of the same cause of action which might have been litigated. *See also Wolf v. Anderson*, 422 N.W.2d 400, 401-02 (N.D. 1988) (holding prior judgment that sellers were not entitled to specific performance in action for breach of contract for deed was res judicata and precluded subsequent action for damages where both actions were based on same factual situation); *Perdue v. Knudson*, 179 N.W.2d 416, 421-22 (N.D. 1970) (same). In *Cokins*, at 377-78 (Syllabus ¶¶ 1 and 3), we said a judgment decreeing specific performance of a contract and determining the rights of the parties is final, and any subsequent order to modify the final judgment is void unless made for the purpose of amending, correcting, or carrying out the judgment. In *Cokins*, 379-80, we held a post-judgment order regarding proration of taxes during a delay in conveying property was void where a prior final judgment granting specific performance of a contract for the sale of land settled all issues between the parties arising out of the contract.

[¶12] Here, in ordering the January 5, 2001 judicial transfer of the property, the trial court cited N.D.R.Civ.P. 70, which provides:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other

> person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

[¶13] Rule 70, N.D.R.Civ.P., is nearly identical to corresponding F.R.Civ.P. 70, and we have often said when a state rule is adopted from a federal rule, we will consider the federal court's interpretation of its rule as persuasive authority for construing our rule. *See Mid-Dakota Clinic, P.C. v. Kolsrud*, 1999 ND 244, ¶ 6, 603 N.W.2d 475; *City of Dickinson v. Lindstrom*, 1998 ND 52, ¶ 11, 575 N.W.2d 440. *See also* N.D.R.Civ.P. 1, Explanatory Note.

[¶14] Relief under F.R.Civ.P. 70 is available only after a judgment is entered. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 218 (1945). *See* 13 James W. Moore, *Moore's Federal Practice* ¶ 70.03 (3rd ed. 2002); 12 Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2nd*, § 3021 (1997). Both F.R.Civ.P. 70, and N.D.R.Civ.P. 70 specifically contemplate "application of the party entitled to performance." Under F.R.Civ.P. 70, parties may proceed by motion ancillary to the original action to compel the specific performance of an act required

by a judgment. *See Spain v. Mountanos*, 690 F.2d 742, 744 (9th Cir. 1982); *Gilbert v. Johnson*, 490 F.2d 827, 829 (5th Cir. 1974). *Cf., Clarke v. Chicago, B. & Q.R. Co.*, 62 F.2d 440, 441 (10th Cir. 1932) (under former equity rules). *See also Linscott v. Foy*, 1998 ME 206, ¶ 9, 716 A.2d 1017 (under M.R.Civ.P. 70); *Scott v. Majors*, 1999 UT App 139, ¶ 4-6, 980 P.2d 214 (under Utah R.Civ.P. 70).

[¶15] In *Spain*, 690 F.2d at 745, the court affirmed an additional award of attorney fees incurred in a proceeding under F.R.Civ.P. 70 to collect an initial $70,000 award of attorney fees ordered in a stipulated judgment enjoining certain prison practices. No issue was raised about the procedure for awarding additional attorney fees as part of the ancillary proceeding under F.R.Civ.P. 70. In *Linscott*, 1998 ME 206, ¶ 9, 716 A.2d 1017, no procedural issue was raised in a case where, as part of the original proceeding, the plaintiff filed a supplemental petition for attorney fees and a setoff of the purchase price after obtaining an order transferring property under M.R.Civ.P. 70. The Maine Supreme Judicial Court affirmed the award of attorney fees and costs as a sanction for "egregious" actions by the defaulting party. *Linscott*, at ¶¶ 16-19. Those authorities suggest an ancillary motion is an appropriate procedure for a court to consider issues dealing with a party's failure to comply with a judgment requiring specific performance for a conveyance of property.

[¶16] In *Westlake North Prop. Owners v. Thousand Oaks*, 915 F.2d 1301, 1303 (9th Cir. 1990), the Ninth Circuit Court of Appeals cited *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-97 (1990), for the principle that imposition of a sanction under F.R.Civ.P. 11 is a collateral issue which may be made after the main action has been terminated. Although in *Westlake*, at 1303-04, the Ninth Circuit

ultimately concluded the trial court erred in sanctioning non-party attorneys under F.R.Civ.P. 70, the court said the trial court had jurisdiction to impose sanctions against parties under F.R.Civ.P. 70 regardless of whether the trial court had jurisdiction over the main action.

[¶17] In *Cooter & Gell*, 496 U.S. at 395-96 (citations omitted), the United States Supreme Court said:

> It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. See 28 U.S.C. § 1919. This Court has indicated that motions for costs or attorney's fees are "independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree." Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. A criminal contempt charge is likewise "'a separate and independent proceeding at law'" that is not part of the original action. A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

[¶18] Similarly, in *American State Bank v. Stoltz*, 345 N.W.2d 365, 367 (N.D. 1984), we recognized this state's

settled law that a supplementary proceeding in aid of execution is not a new or separate action, but is merely a proceeding in a pending action against a judgment debtor. We said a supplementary proceeding was not an action on the judgment, but was a continuation of, and auxiliary to, the original action. *Id.* In *Stoltz*, at 367, we rejected a judgment debtor's claim the trial court lost personal jurisdiction over him when the judgment was entered.

[¶19] In *Mitchell*, 19 N.D. at 744, 124 N.W. at 950 (quoting from Pomeroy on Contracts (2nd ed. § 474)) we said:

> "All the instances in which equity thus awards damages, either in place of or in addition to some other special remedy, are particular applications of the one general principle, that complete justice should be done between litigant parties whenever jurisdiction has been acquired over them to grant any relief. This doctrine is well established, and is indeed, too familiar to require the citation of authority that whenever a court of equity has once acquired jurisdiction of a cause it will retain such cause in order to do full and complete justice between the parties with respect to the subject matter. To this end, when jurisdiction has been obtained on other grounds and for the purpose of administering an equitable remedy, damages may be assessed and adjudged in lieu of or as ancillary to the equitable relief so that the plaintiff may not be put to the trouble, expense, and delay of a second suit brought in another tribunal."

Our statements in *Mitchell* about ancillary relief and the trouble, expense, and delay of a second action are equally applicable under our current rules of civil procedure, which govern the procedure in all suits of a civil nature,

whether cognizable as cases at law or in equity, and which are construed to secure the just, speedy, and inexpensive determination of every action. *See* N.D.R.Civ.P. 1. The statements in *Mitchell* are also consistent with N.D.C.C. § 27-05-06(3), which confers jurisdiction on district courts for "[a]ll the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carrying into effect their judgments, orders, and other determinations."

[¶20] Here, shortly after Matrix exercised the option to purchase the land in early July 1999, it initiated an action for specific performance of the option agreement. In November 1999, the trial court granted Matrix summary judgment for specific performance of the option agreement without any claim for, or award of, damages for delay in conveying the land. On June 7, 2000, this Court issued its mandate affirming the summary judgment for specific performance. Matrix then moved for an order compelling TAG to transfer the property and subsequently indicated it would seek costs, attorney fees, and damages for TAG's delay in conveying the property. After procedural posturing and further delay by TAG, the trial court ultimately ordered the transfer of the land to Matrix on January 5, 2001, and Matrix then moved for costs, attorney fees, and damages incurred as a result of TAG's delay in conveying the land. Under these circumstances, we conclude Matrix's ancillary motion for costs, attorney fees, and damages was an appropriate vehicle, as part of enforcement of the judgment under N.D.R.Civ.P. 70, for the trial court to consider awarding costs, attorney fees, and damages incurred by a delay in conveying the land. However, because Matrix could have but did not make a claim for

damages for delay in conveyance in the judgment that this Court affirmed in *Matrix I*, we conclude Matrix may be entitled to damages only for a delay in conveying the land after our June 7, 2000 mandate in *Matrix I*. *See Wolf*, 422 N.W.2d at 401-02; *Perdue*, 179 N.W.2d at 421-22; *Cokins*, 136 N.W.2d at 380.

[¶21] We also reject TAG's arguments that N.D.C.C. § 27-05-27 places exclusive authority to modify a judgment in the trial judge that rendered the November 1999 judgment, and that this money judgment, which was issued by a different trial judge, is void, or erroneously issued and voidable.

[¶22] Section 27-05-27, N.D.C.C., provides:

> Except as provided by subsection 2 of section 29-15-21, any motion for a new trial, settlement of a proposed case, judgment notwithstanding the verdict, or vacation or modification of an order, judgment, or other proceeding, must be presented and heard before the judge before whom the matter was heard, considered, or determined, unless for any reason the judge is unable to act.

[¶23] The language of N.D.C.C. § 27-05-27 applies to "any motion for a new trial, settlement of a proposed case, judgment notwithstanding the verdict, or vacation or modification of an order, judgment, or other proceeding." This ancillary proceeding emanated from a proceeding for the enforcement of a judgment for specific performance, and the plain language of that statute does not apply to the enforcement of a judgment. We conclude N.D.C.C. § 27-05-27 does not apply to this ancillary proceeding.

III

[¶24] TAG argues Matrix was not entitled to damages for loss of use of the property.

A

[¶25] TAG argues Matrix was not entitled to any damages, because Matrix never made an unconditional tender of performance and the earliest date it can claim a tender of part of the money due to TAG was January 5, 2001, the date the trial court ordered conveyance of the land.

[¶26] TAG misreads a statement in *Matrix II*, 2000 ND 213, ¶ 1, 622 N.W.2d 432, "requiring TAG and Grettum to convey the subject property upon tender by Matrix of the purchase price set in the 1996 option agreement." According to TAG, that language "conclusively determined that TAG's duty to convey was conditioned upon the tender of performance by Matrix." In *Matrix I*, 2000 ND 88, ¶¶ 1, 14-18, 609 N.W.2d 737, however, we clearly held that Matrix "timely and unconditionally complied with the option agreement." Our decision in *Matrix I* is the law of the case regarding Matrix's compliance with the option, *see Tom Beuchler Const. v. City of Williston*, 413 N.W.2d 336, 339 (N.D. 1987), and it is a strained interpretation of *Matrix I* for TAG to argue that Matrix has not unconditionally complied with the option agreement. To the extent TAG now claims it had no duty to convey the property until Matrix made a full and actual tender of the purchase price to TAG, we again reiterate and clarify, for TAG's benefit, that Matrix timely and unconditionally complied with the option agreement and was entitled to performance under the option agreement. To the extent TAG claims it did not delay transfer of the property because

Matrix purportedly did not make a full and complete tender or actual payment of the purchase price, we reject TAG's arguments involving that assertion. *See Matrix I*, at ¶¶ 1, 14-18.

B

[¶27] TAG argues even if Matrix is entitled to damages, the trial court erred in calculating those damages. TAG states, in calculating damages, the trial court followed Matrix's "claim that it should have interest on the liquidated purchase price of the real property from August 15, 1999, the time Matrix should have first paid TAG [under the terms of the option agreement], to January 5, 2001," the date the trial court transferred the land to Matrix. TAG argues if Matrix is entitled to damages, those damages are limited to the rental value of the land, or an accounting and delivery of the fruits of the illegitimate possession, offset by interest on the purchase price of the land due to TAG. Because of our earlier conclusion about the time frame for damages and the procedural posture of this issue, we only need consider whether Matrix was entitled to damages for TAG's delay in conveying the land after this Court's June 7, 2000 mandate in *Matrix I* to the trial court's judicial conveyance of the land to Matrix on January 5, 2001.

[¶28] Section 32-03-21, N.D.C.C., provides:

> The detriment caused by the wrongful occupation of real property in cases not embraced in sections 32-03-22, 32-03-27, 32-03-28, and 32-03-29 is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the

> action or proceeding to enforce the right to damages and the costs, if any, of recovering the possession.

[¶29] Under N.D.C.C. § 32-03-21, a seller who wrongfully occupies real property and wrongfully delays the conveyance of that property is liable for the value of the use of the property for the time of such occupation. *Bumann*, 203 N.W.2d at 438; *See also Orfield*, 33 N.D. at 579-81, 157 N.W. at 127; *Beddow*, 22 N.D. at 60, 132 N.W. at 640; *Mitchell*, 19 N.D. at 744, 124 N.W. at 950. In *Bumann*, at 438, we said the value of the use may be found by requiring the party at fault to make an accounting and deliver over the fruits of the illegal possession, or to pay the fair rental value of the property. We also said the delay in performance of an agreement to convey land may be the root of special as well as general damages to the buyer. *Id.* at 439. We cautioned, however, that double recovery should not be given, first as general damages, and again as an item of special damages. *Id.*

[¶30] We have recognized the object of a court of equity is to place parties who are not at fault as nearly as possible in the same position they would have been in if there had been no default by the other party. *Orfield*, 33 N.D. at 579-81, 157 N.W. at 127; *Pillsbury v. J.B. Streeter, Jr., Co.*, 15 N.D. 174, 182, 107 N.W. 40, 43 (1906). When a conveyance of property is delayed, financial adjustments in the nature of an accounting may be made to put the parties in the same position they would have been in if the contract had been performed in a timely manner. *See generally* Annot., 11 A.L.R. 4th at pp. 892-97; Annot., 7 A.L.R. 2nd at § 1.

[¶31] Here, we reject TAG's claim it was entitled to an offset for interest on the purchase price of the land during the time TAG delayed conveying the land to Matrix. This

record unequivocally demonstrates a pattern of dilatory and vexatious conduct by TAG in delaying the conveyance of the land to Matrix. Moreover, under the option agreement, Matrix was entitled to possession of the land on August 15, 1999. Although we have concluded Matrix could have but did not make a claim for damages from that date in the judgment that was affirmed in *Matrix I*, TAG agrees the trial court awarded Matrix interest on the purchase price of the land from August 15, 1999 to January 5, 2001, which was a valuation suggested by TAG when, in seeking to avoid closing on January 5, 2001, TAG claimed it should receive interest on the purchase price during the same time period. Matrix did not receive the fruits of TAG's unlawful possession, or the rental value of the land during the time when TAG delayed conveying it. TAG retained the benefits from the land during the delay in conveying it, and TAG does not dispute Matrix's claim that the property is prime development land. Under those circumstances, we conclude Matrix was entitled to the measure of damages awarded by the trial court for the delay in conveying the land from this Court's June 7, 2000 mandate in *Matrix I* to January 5, 2001, the date the trial court ordered the conveyance of the land to Matrix. Accordingly, we remand this issue to the trial court to compute Matrix's damages during that time period.

IV

[¶32] TAG argues Matrix was not entitled to costs and attorney fees.

[¶33] If there is a delay in conveying land, N.D.C.C. § 32-03-21, authorizes the award of the "costs, if any, of recovering the possession." *See Bumann*, 203 N.W.2d at 438.

Section 28-26-01(2), N.D.C.C., authorizes the award of reasonable actual and statutory costs, including reasonable attorney fees, for defending a frivolous claim. *See In re Estate of Dion*, 2001 ND 53, ¶ 45-47, 623 N.W.2d 720. In *Dion*, at ¶ 47, we affirmed a trial court's decision to award attorney fees incurred by a party in defending against frivolous post-trial motions by another party.

[¶34] In *Matrix II* and *Matrix III*, we summarily affirmed two prior appeals by TAG in part under N.D.R.App.P. 35.1(a)(1), which authorizes affirmance of appeals that are frivolous and completely without merit. This record demonstrates that TAG has engaged in a protracted and dilatory pattern of conduct after this Court's decision in *Matrix I*, repeatedly pressing spurious claims that previously had been rejected by the trial court and this Court. *See Dion*, 2001 ND 53, ¶ 47, 623 N.W.2d 720. Under the circumstances of this case, we conclude N.D.C.C. §§ 32-03-21 and 28-26-01(2), authorize an award to Matrix of litigation costs and attorney fees for recovering possession of the land.

[¶35] A trial court has considerable discretion in awarding costs and attorney fees, and its decision will not be overturned on appeal absent an abuse of discretion. *Dion*, 2001 ND 53, ¶¶ 44, 46, 623 N.W.2d 720; *Gissel v. Kenmare Township*, 512 N.W.2d 470, 477 (N.D. 1994). Here, the trial court was well aware of the dilatory nature of TAG's conduct in these proceedings. The court indicated it had reviewed the affidavits setting forth the specific costs and attorney fees and the time when they were incurred. Under the circumstances of this case, we conclude the trial court did not abuse its discretion in awarding Matrix litigation costs and attorney fees.

V

[¶36] TAG argues judicial estoppel bars Matrix from asserting inconsistent prejudgment and post-judgment positions.

[¶37] TAG did not raise this argument in its August 21, 2001 brief in response to Matrix's motion for costs, attorney fees, and damages, and TAG is precluded from raising the issue for the first time on appeal. *See Robert v. Aircraft Inv. Co. Inc.*, 1998 ND 62, ¶ 14, 575 N.W.2d 672. Moreover, TAG's argument appears to be based in part on its misplaced assertion that Matrix did not unconditionally comply with the option agreement, an assertion we specifically rejected in *Matrix I* and explicitly have reiterated for TAG's benefit in this case. Accordingly, we reject TAG's argument about judicial estoppel.

VI

[¶38] As Justice Vogel wrote for this Court in *City of Wahpeton v. Drake-Henne, Inc.*, 228 N.W.2d 324, 331 (N.D. 1975) (quoting from *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 597-98 (5th Cir. 1963)), "'"It is for the public interest and policy to make an end to litigation . . .' so that '. . . suits may not be immortal, while men are mortal."'" Those comments are especially applicable to the protracted proceedings in this case.

VII

[¶39] We affirm the trial court's award of costs and attorney fees, and we modify the time period for the award

of damages and remand for recalculation in accordance with this opinion.

[¶40] Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom
William F. Hodny, S.J.
Gerald W. VandeWalle, C.J.

[¶41] The Honorable William F. Hodny, S.J., sitting in place of Kapsner, J., disqualified.

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

ORDER

The above-captioned matter came on for hearing before the Court on the 27th day of August, 2001, on Plaintiff's Amended Motion for Damages. Sidney J. Spaeth of Vogel, Weir, Hunke & McCormick, Ltd., appeared on behalf of plaintiff. Jonathan T. Garaas of Garaas Law Firm, appeared on behalf of defendants.

The Court, having reviewed the memoranda of law, heard the arguments of counsel, and being fully advised in the premises;

It is hereby **ORDERED** that:

1. Defendants, and each of them jointly and severally, shall pay to Plaintiff damages for costs in the amount of $4,127.60; and

2. Defendants, and each of them jointly and severally, shall pay to Plaintiff damages for attorneys' fees in the amount of $48,642; and

3. Defendants, and each of them jointly and severally, shall pay to Plaintiff damages for loss of use of the property from August 15, 1999 to January 5, 2001, in the amount of $135,867.19.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY FORTHWITH.

Dated this 27th day of August, 2001.

BY THE COURT:

/s/ Georgia Dawson
Judge of District Court

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

JUDGMENT

The Court having entered its order for judgment with respect to plaintiff's amended motion for damages,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff shall have and recover from the defendants, jointly and severally, the sum of $188,636.79.

Witnesseth the Honorable Georgia Dawson, Judge of the District Court for the County of Cass this 11th day of September, 2001.

/s/ Dorothy Howard
Clerk of the District Court

By /s/ Della M. Hagen,
Deputy

Filed 6/6/02 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 99

Matrix Properties Corporation, Plaintiff and Appellee

v.

JCG Investments, L.L.C.; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants

Carol A. Grettum, TAG Investments, and Jonathan T. Garaas, Appellants

No. 20020011

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Cynthia Rothe-Seeger, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for appellants.

Matrix Properties Corp. v. JCG Investments, L.L.C.
No. 20020011

Per Curiam.

[¶ 1] TAG Investments, Carol Grettum, and Jonathan T. Garaas appeal from a judgment quieting title to certain real property and ordering TAG and Garaas to pay costs and attorneys fees, and from an order denying a motion to alter, amend, or vacate the judgment. We affirm under N.D.R.App.P. 35.1(a)(1). We specifically note that under the facts of this case TAG and Grettum have no vendor's lien on the subject real property.

[¶ 2] We conclude that the appeal is frivolous. We, therefore, order under N.D.R.App.P. 38 and 39 that Matrix is entitled to double costs in the amount of $150 and is entitled to attorney fees in the amount of $5,000, for a total of $5,150 for this appeal.

[¶ 3] Gerald W. VandeWalle, C.J.
Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom
Donald L. Jorgensen, D.J.

[¶ 4] The Honorable Donald L. Jorgensen, D.J., sitting in place of Kapsner, J., disqualified.

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Matrix Properties Corporation,	
Plaintiff,	**MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT**
vs.	
JCG Investments, L.L.C; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint,	**Civil No. 09-01-C-1052**
Defendants.	

The above matter was brought before the Court on Plaintiff's Motion for Summary Judgment to Quiet Title. Defendant TAG Investments filed a brief in opposition to the motion through its attorney Jonathan Garaas. Defendant Carol Grettum filed a brief in opposition to the motion through her attorney J. Philip Johnson. This case is the result of decisions made in Civil File No. 99-02045, and the Court takes judicial notice of that file. A hearing was held on November 1, 2001.

STATEMENT OF THE CASE

In October 1996, TAG Investments agreed to sell E.W. Wylie, n/k/a Matrix Properties, certain real estate in Cass County. *Matrix Properties Corp. v. TAG Invs.*, 2000 ND 88,

¶ 2, 609 N.W.2d 737. As part of the transaction, TAG gave Matrix an option to purchase an additional 114 acres. *Id.* In July 1999, TAG informed Matrix that it would not honor the option agreement. *Id.* at ¶ 7. Matrix filed suit against TAG and James Grettum[1] arguing that it had complied with the option agreement. *Id.* On October 27, 1999, this Court found that Matrix had complied with the option agreement and ordered specific performance. On November 2, 1999, Judgment was entered.

On December 21, 1999, Matrix filed a lis pendens on the 114 acres that was subject to the option agreement. *See Order*, CV-99-02045, doc. #185 (Jan. 5, 2001). On January 26, 2000, James Grettum deeded Carol Grettum an interest in Tract 2B, which is a part of the 114 acres. *See Pl.'s Ex. #2*, CV-99-02045, doc. #183 (Jan. 5, 2001). On April 27, 2000, the North Dakota Supreme Court affirmed this Court in holding that the option had been exercised, and it ordered specific performance of the option agreement. *Matrix*, 2000 ND 88, ¶ 1, 609 N.W.2d 737.

However, this ruling did not resolve the matter. On November 8, 2000, this Court issued an Order directing Defendants to issue all the appropriate deeds and documents to the parcels that comprised the 114 acres. *See Order*, CV-99-02045, doc. #123 (Nov. 8, 2000). Once all the appropriate deeds and documents were executed and delivered to Matrix, the Order directed Matrix to pay Defendants $876,972.35. *Id.* On December 12, 2000, the North Dakota Supreme Court affirmed this Order, and

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[1] James Grettum is a general partner in TAG Investments. *Matrix*, 2000 ND 88, ¶ 5, 609 N.W.2d 737.

awarded double costs to Matrix. *Matrix Properties Corp. v. TAG Invs.*, 2000 ND 213, ¶ 1, 622 N.W.2d 432. The supreme court also directed the district court to order specific performance requiring TAG and James Grettum to convey the 114 acres once Matrix paid for the land. *Id.*

Again this did not resolve the matter. On January 5, 2001, the Court held another hearing to perform the closing, but Attorney Garaas refused to accept the checks that Matrix issued. *See Hr'g Tr. at 60*, CV-99-02045 (Jan. 5, 2001). Therefore Matrix mailed the checks to the Garaas Law Firm. *See Certificate of Service*, CV-99-02045, doc. #187 (Jan. 5, 2001). Attorney Garaas acknowledged receipt of these checks. *See Mot. in Supp. of Aff. of James A. Grettum*, CV-99-02045, doc. #191 (Jan. 16, 2001).

Also on January 5, the Court issued an order that stated that Matrix had paid for the 114 acres, that all interests in that real estate were divested from any party claiming an interest, and that all interests in the real estate were now vested in Matrix. *See Order*, CV-99-02045, doc. #185 (Jan. 5, 2001). The North Dakota Supreme Court affirmed this Order and awarded double costs to Matrix under N.D.R.App.P. 38 and 39. *Matrix Properties Corp. v. TAG Invs.*, 2001 ND 128, ¶ 1.

Yet again this did not resolve the matter. On April 9, 2001, Matrix had to file a complaint to quiet title because Defendants still have not transferred the real estate to Matrix. Matrix's motion for summary judgment is to have quiet title granted. Matrix's motion for Rule 11 sanctions is based on the fact that Defendants filed, without any basis, an answer to the complaint, and Defendants continue to litigate this case even though it has already been decided.

ANALYSIS

I. Summary Judgment

Summary judgment is a method for promptly and expeditiously disposing of a controversy, without trial, if either party is entitled to judgment as a matter of law. *Mead v. Farmers Union Mut. Ins. Co.*, 2000 ND 139, ¶ 12, 613 N.W.2d 512. "Res judicata means that a valid, existing final judgment from a court of competent jurisdiction is conclusive, with regard to the issues raised . . . as to the parties and their privies in all other actions." *Id.* at ¶ 15 (quoting *Ohio Cas. Ins. Co. v. Clark*, 1998 ND 153, ¶ 23, 583 N.W.2d 377).

In this Case, the only two parties claiming an interest in the real estate are TAG and Carol Grettum. This issue has already been litigated, and this Court divested both parties of their interests in the January 5, 2001 Order. The North Dakota Supreme Court affirmed that order. *Matrix*, 2001 ND 128, ¶ 1. Therefore, this issue is res judicata, and summary judgment is appropriate. *Mead*, 2000 ND 139, ¶ 15, ¶ 12, 613 N.W.2d 512.

The Court has considered the remainder of the arguments made by Attorney Garaas and deems them to be without merit. The arguments that Attorney Johnson makes have previously been considered by the Court. *See Order*, CV-99-02045, doc. #185 (Jan. 5, 2001). Carol Grettum took her interest in the property subject to the lis pendens. Under North Dakota Century Code section 28-05-07, she is bound by all proceedings subsequent to December 21, 1999. This issue is also res judicata, and summary judgment is appropriate. *Mead*, 2000 ND 139, ¶ 15.

On January 5, 2001, Matrix mailed three checks to Attorney Garaas' office, and one of the checks was in the amount of $254,830.58. *Certificate of Service*, CV-99-02045, doc. #187 (Jan. 5, 2001). The check was written out to TAG Investments, James A. Garaas, and Carol A. Grettum. *Id.* Attorney Garaas acknowledged receipt of the check. *See Mot. in Supp. of Aff. of James A. Grettum*, CV-99-02045, doc. #191 (Jan. 16, 2001). Carol Grettum has been paid.

II. Rule 11 Sanctions

A court may award appropriate sanctions against an attorney who violates Rule 11(b) of the North Dakota Rules of Civil Procedure. N.D.R.Civ.P. 11(c). Rule 11(b) states that when an attorney signs a pleading or written motion, he or she is certifying that to be the best of that person's knowledge, the defenses are warranted by existing law or the defenses are warranted by a nonfrivolous extension of existing law. Rule 11 requires a court to impose appropriate sanctions upon the person signing a pleading or motion if that party violates the requirements of the rule. *Williams v. State*, 405 N.W.2d 615, 624 (N.D. 1987).

A person's actions must be objectively reasonable in order to avoid Rule 11 sanctions. *Wesley v. Don Stein Buick, Inc.*, 184 F.R.D. 376, 378 (D.Kan. 1998). As detailed above, the history of this case reveals that the Court has had to intervene numerous times in order to compel parties, represented by Attorney Garaas, to deliver the appropriate deeds and documents to the property. The North Dakota Supreme Court has repeatedly affirmed these orders for specific performance. The present quiet

title action would not have been necessary if Defendants would have conveyed the property as ordered.

In this quiet title action, Attorney Garaas filed and signed an answer on behalf of TAG Investments and Carol Grettum. In the answer, he continued to argue that the option agreement was not valid despite the North Dakota Supreme Court's April 27, 2000 decision. Further, Attorney Garaas filed and signed a motion opposing summary judgment. The arguments are completely without merit. Attorney Garaas' actions in this case are not objectively reasonable. *See Wesley*, 184 F.R.D. at 378 (stating the standard for Rule 11 sanctions). Rule 11 sanctions are required in this case. *See Williams*, 405 N.W.2d at 624 (stating that any person who signs a pleading or motion in violation of Rule 11 must be sanctioned).

DECISION

IT IS ORDERED:

1. Defendants, known and unknown (collectively "Defendants"), having been properly served with this action, are decreed to have no claim, estate interest in, or lien or encumbrance upon the Property at issue, the legal description of which is as follows (the "Property"):

TRACT A:

The East Half of the Southwest Quarter of Section Twenty-two, in Township One Hundred Thirty-nine North of Range Forty-nine West of the Fifth Principal Meridian, Cass County, North Dakota.

TRACT B:

A tract of land located in the Southeast Quarter (SE¼) of Section Twenty-two (22), Township One Hundred Thirty-nine (139) North of Range Forty-nine (49) West of The Fifth Principal Meridian, described as follows:

Beginning at the Northwest Corner of the SE¼; thence N88 04'13"E along the North line of the SE¼ for a distance of 1758.84 feet; thence 502 14'13"E 137.39 feet; thence southwesterly along a circular curve, concave to the northwest, radius of 750.00 feet and an arc length of 613.59 feet; thence S44 38'18"W 342.67 feet; thence along a circular curve, concave to the northwest, radius of 1000.00 feet and an arc length of 764.53 feet; thence S88 26'34"W 572.66 feet to a point on the West line of the SE¼; thence N02 23'48"W, along the West line of the SE¼, 1191.78 feet to the Northwest corner of the Southeast Quarter and the point of beginning.

[Less the West One Hundred and Twenty feet (W. 120') thereof]

2. That title to the Property be quieted in the name of Plaintiff Matrix Properties Corporation as to any claims of Defendants, and Defendants are forever barred and enjoined from further asserting same.

3. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally, shall pay to Plaintiff damages for costs in the amount of $133.59.

4. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally,

shall pay to Plaintiff damages for costs in the amount of $7,211.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 7th day of November, 2001.

BY THE COURT:

/s/ Cynthia Rothe-Seeger
Cynthia Rothe-Seeger
District Judge
East Central Judicial District

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Matrix Properties Corporation, Plaintiff, vs. JCG Investments, L.L.C; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants.	File No. 09-01-C-1052 **JUDGMENT**

In accordance with the Court's Memorandum Opinion and Order Granting Summary Judgment dated November 7, 2001, it is

ORDERED, ADJUDGED, AND DECREED that:

1. Defendants, known and unknown (collectively "Defendants"), having been properly served with this action, are decreed to have no claim, estate interest in, or lien or encumbrance upon the Property at issue, the legal description of which is as follows (the "Property"):

TRACT A:

The East Half of the Southwest Quarter of Section Twenty-two, in Township One Hundred Thirty-nine North of Range Forty-nine West of the Fifth Principal Meridian, Cass County, North Dakota.

TRACT B:

A tract of land located in the Southeast Quarter (SE¼) of Section Twenty-two (22), Township One Hundred Thirty-nine (139) North of Range Forty-nine (49) West of The Fifth Principal Meridian, described as follows:

Beginning at the Northwest Corner of the SE¼; thence N88° 04'18"E along the North line of the SE¼ for a distance of 1758.84 feet; thence 502° 14'13"E 137.39 feet; thence southwesterly along a circular curve, concave to the northwest, radius of 750.00 feet and an arc length of 613.59 feet; thence S44° 38'18"W 342.67 feet; thence along a circular curve, concave to the northwest, radius of 1000.00 feet and an arc length of 764.53 feet; thence S88° 26'34"W 572.66 feet to a point on the West line of the SE¼; thence N02° 23'48"W, along the West line of the SE¼, 1191.78 feet to the Northwest corner of the Southeast Quarter and the point of beginning.

[Less the West One Hundred and Twenty feet (W. 120') thereof]

2. That title to the Property be quieted in the name of Plaintiff Matrix Properties Corporation as to any claims of Defendants, and Defendants are forever barred and enjoined from further asserting same.

3. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally, shall pay to Plaintiff damages for costs in the amount of $133.59.

4. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally,

shall pay to Plaintiff damages for costs in the amount of $7,211.00.

making a total judgment of $7,344.59. (lmb)

WITNESS, The Honorable Cynthia Rothe-Seeger, and my hand and seal this 14th day of November, 2001.

/s/ Dorothy Howard
Dorothy Howard
Clerk of Cass County District Court
By: Linda Brook Deputy

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Matrix Properties Corporation,	)	
Plaintiff,	)	**ORDER DENYING MOTION TO ALTER, AMEND, OR VACATE THE JUDGMENT**
vs.	)	
JCG Investments, L.L.C; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint,	)	**Civil No. 09-01-C-1052**
Defendants.	)	

The above matter was brought before the Court on Defendants TAG Investments and Carol Grettum's Motion to Alter, Amend or Vacate the Judgment in this quiet title action. A hearing was held on December 21, 2001.

Under Rule 52(b) of the North Dakota Rules of Civil Procedure, a court may amend its findings and may amend the judgment. Under Rule 60(b), a court may relieve a party of a final judgment if any of the six enumerated reasons apply.

After reviewing the file and judgment in this case, the Court finds that there are no significant errors that require the judgment to be amended. Additionally, the Court does not find that any of the six enumerated reasons

under Rule 60(b) apply in this case. Therefore, the judgment will not be vacated.

DECISION

IT IS ORDERED:

The motion to alter, amend, or vacate the judgment is **DENIED**.

Dated this 3rd day of January, 2002.

BY THE COURT:

/s/ Cynthia Rothe-Seeger
Cynthia Rothe-Seeger
District Judge
East Central Judicial District

Filed 7/16/02 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 119

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

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No. 20020026

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Georgia Dawson, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, ND 58103-3796, for defendants and appellants.

Matrix v. TAG Investments

No. 20020026

Per Curiam.

[¶ 1] TAG Investments and James A. Grettum appealed from an order and judgment offsetting against the amount Matrix Properties Corporation was ordered to pay TAG and Grettum for real property under a 1996 option agreement, the amount awarded to Matrix from TAG and Grettum for costs, attorney fees and damages for delay and loss of use of the property, resulting in Matrix owing TAG and Grettum a balance of $66,193.79. The major arguments raised by TAG and Grettum have been rejected by this Court in previous decisions in this protracted litigation. *See Matrix Properties Corp. v. TAG Investments*, 2000 ND 88, 609 N.W.2d 737; *Matrix Properties Corp. v. TAG Investments*, 2000 ND 213, 622 N.W.2d 432; *Matrix Properties Corp. v. TAG Investments*, 2001 ND 128, 636 N.W.2d 674; *Matrix Properties Corp. v. TAG Investments*, 2002 ND 86, 644 N.W.2d 601; *Matrix Properties Corp. v. JCG Investments, L.L.C.*, 2002 ND 99. We affirm under N.D.R.App.P. 35.1(a)(7), subject to the adjustment of damages ordered in *Matrix Properties Corp.*, 2002 ND 86, ¶ 39, 644 N.W.2d 601, and a $75 reduction in the cost judgment.

[¶ 2] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William. A. Neumann
Mary Muehlen Maring
William F. Hodny, S.J.

[¶ 3] The Honorable William F. Hodny, Surrogate Judge, sitting in place of Kapsner, J., disqualified.

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF CASS EAST CENTRAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation, formerly known as E. W. Wylie Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	Civil No. CV-99-02045 **ORDER**

Plaintiff's Motion to Offset Judgments and the Motion of Carol Grettum to Intervene/To Direct Payment of Proceeds From Sale of Real Estate came on before this Court for consideration on November 21, 2001, at 1:30 p.m. in the Cass County Courthouse, Fargo, North Dakota. Appearances were as noted on the record. Based on the files and pleadings herein, IT IS THE ORDER OF THIS COURT as follows:

1. Plaintiff's Motion to Offset Judgments is granted. Plaintiff is permitted to offset its indebtedness respecting Tract 2b, as determined by this Court's November 20, 1999 Judgment and January 5, 2001 Order, against the Defendants' monetary obligation to the Plaintiff as determined by this Court in its September 11, 2001 Judgment. The balance of $66,193.79 due and owing by the Plaintiff to the Defendants for Tract

2b, shall in accord with this Court's January 5, 2001 Order, be paid to the Defendant TAG Investments.

2. The Motion of Carol Grettum to Intervene And to Direct Payment of Proceeds from Sale of Real Estate is denied on grounds that the same is untimely and lacks a factual or legal basis.

Dated this 27th day of November, 2001.

/s/ Georgia Dawson
Honorable Georgia Dawson
District Court Judge

[Handwritten]

Dean Clerk
J should be entered as submitted
12/6/2001 ep

(Filed Dec. 6, 2001)

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

JUDGMENT

Pursuant to the following Judgments and Orders wherein Plaintiff was awarded relief against the Defendants:

1) A Judgment of the North Dakota Supreme Court dated April 27, 2000, (attached hereto as Exhibit A); and

2) A Judgment of the North Dakota Supreme Court dated December 12, 2000, awarding double costs and disbursements (attached hereto as Exhibit B); and

2) An Order of Dismissal of the North Dakota Supreme Court dated February 7, 2001, dismissing the appeal of defendants (attached hereto as Exhibit C); and

3) An Order of the District Court dated January 5, 2001, transferring the Property (attached hereto as Exhibit D); and

4) A Judgment of the North Dakota Supreme Court dated July 13, 2001, awarding double costs and disbursements (attached hereto as Exhibit E);

THEREFORE, it is ordered, adjudged and decreed that pursuant to the Orders and Judgments set forth above and in Exhibits A, B, C and E, Plaintiff shall have and recover from the Defendants, jointly and severally, the sum of $450; and

Pursuant to the Court's Order of January 5, 2001, it is further ordered, adjudged and decreed that:

GENERAL

1. Three Parcels of real property are subject to this action, which parcels are referenced in this Order and more particularly described on Attached Exhibit A as Tract 1, Tract 2a and Tract 2b (sometimes, collectively, referred to herein as the "Tracts").

2. This Court and the North Dakota Supreme Court have previously ordered TAG and James A. Grettum to specifically perform under the Option to Purchase dated October 14, 1996 (the "Option to Purchase") among Matrix, TAG, James A. Grettum, Wells Fargo Bank North Dakota, N.A., f/k/a Norwest Bank North Dakota, N.A., as Trustee of the Clapp Land Trust Agreement created by Margaret C. Schuster, Edwin G. Clapp, Jr., and Dorothy C. King, on October 14, 1976 (sometimes referred to herein as the "Clapp Land Trust") and others.

3. TAG and James A. Grettum have repeatedly refused to so specifically perform to convey the Tracts to Matrix. Accordingly, this Court, in part pursuant to

N.D.R.C.P. 70, must divest any and all right, title and interest of certain parties to the Tracts, and vest in Matrix any and all such right, title and interest, as more fully set forth herein.

TRACT 1

4. Pursuant to Sections 2, 13 and 17 of the Option to Purchase, the sum of $332,900.00 is owed by Matrix to TAG for Tract 1.[1]

5. Fee title to Tract 1 is currently held in the name of the Clapp Land Trust, and is subject to the unrecorded Land Option and Selected Land Agreement dated August 23, 1993, as amended by two amendments dated April 1, 1996 and October 14, 1996 (as amended, the "Underlying Option"), between the Clapp Land Trust, as optionor, and TAG Investments, as successor optionee. Copies of the Underlying Option are attached hereto as Exhibit B.

6. Pursuant to Section 11 of the Underlying Option, the amount to which the Clapp Land Trust is entitled for relinquishing its fee interest in Tract 1 is $202,872.00. Matrix has paid the sum of $202,872.00 to the Clapp Land Trust, and is entitled to a credit for such sum against sums otherwise owing to TAG for Tract 1 under the Option to Purchase. Accordingly, Matrix has paid to TAG the sum of $130,028.00.[2]

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[1] (35.52 acres @ $9,375.00/acre) minus $100.00 (abstract reimbursement) minus 0 (2000 taxes fully paid) equals $332,900.00

[2] $332,900.00 minus $202,872.00 equals $130,028.00.

7. Based upon such payments by Matrix to TAG and the Clapp Land Trust:

a. Any and all rights, title and interests of TAG Investments and James A. Grettum, or anyone claiming by, through or from either of them, in and to tract 1 are divested in whole, and any and all such rights, title and interests are conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

b. Any and all rights, title and interests of TAG Investments and James A. Grettum, or anyone claiming by, through or from either of them, in and to the Underlying Option as pertains to Tract 1 is divested, and any and all such rights, title and interests as conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

8. The Clapp Land Trust shall convey Tract 1 to Matrix by Warranty Deed according to the terms and provisions of the Underlying Option in the form attached hereto as Exhibit C.

TRACT 2a

9. Pursuant to Sections 2, 13 and 17 of the Option to Purchase, the sum of $291,509.97[3] is owed by Matrix to TAG for Tract 2a. Matrix has paid such sum to TAG.

[3] (31.15 acres @ $9,375.00/acre) minus $100.00 (abstract reimbursement) minus $421.28 (unpaid 2000 taxes) equals $291,509.97.

10. Based upon such payment, any and all rights, title and interests of TAG Investments and James A. Grettum, or anyone claiming by, through or from either of them, in and to Tract 2a is divested in whole, and any and all such rights, title and interests are conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

TRACT 2b

11. Pursuant to Sections 2, 13 and 17 of the Option to Purchase, the sum of $254,830.58[4] is owed by Matrix to TAG for Tract 2b. Matrix has paid such sum to TAG, James A. Grettum and Carol A. Grettum, jointly.

12. Based upon such payment, any and all rights, title and interests of TAG Investments, James A. Grettum or Carol A. Grettum, or anyone claiming by, through or from any of them, in and to Tract 2b is divested in whole, and any and all such rights, title and interests are conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

LIS PENDENS

13. The rights, title and interests of TAG Investments, James A. Grettum and Carol A. Grettum, and anyone claiming by, through or from any of them, are

[4] (27.22 acres @ $9,375.00/acre minus $356.92 (2000 unpaid taxes) equals $254,830.58.

adjudicated as provided in paragraphs 7, 10 and 12 above for, among others, the following reasons:

a. Plaintiff recorded its Notice of Lis Pendens in this action, against the real property subject to this action, in the office of the Cass County, North Dakota Register of Deeds on December 21, 1999, at 1:00 p.m., as Doc. No. 948127;

b. Carol A. Grettum received a quit claim deed from defendant James a. Grettum, covering Tract 2b, which deed was dated January 26, 2000, and was recorded in the office of the Cass County, North Dakota Register of Deeds on May 4, 2000 as Doc. No. 956204; and

c. Pursuant to N.D.C.C. § 28-05-07, Carol A. Grettum and anyone claiming by, through or from TAG Investments, James A. Grettum or Carol Grettum whose conveyance or encumbrance is executed or recorded after the time of filing of said Notice of Lis Pendens is deemed a subsequent purchaser or encumbrancer with notice and is bound by these proceedings to the same extent as if they were a party to this action.

WITNESS, The Honorable Georgia Dawson, and my hand and seal this 6th day of December, 2001.

/s/ Dorothy Howard
Dorothy Howard
Clerk of Cass County District Court

Filed 4/27/00 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2000 ND 88

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

---

No. 990336

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Ralph R. Erickson, Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Chief Justice.

Sidney J. Spaeth, Vogel, Weir, Bye, Hunke & McCormick, Ltd., 502 First Avenue North, P.O. Box 1389, Fargo, ND 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, 1314 23rd Street South, Fargo, ND 58103, for defendants and appellants.

Matrix Properties Corp. v. TAG Investments

No. 990336

VandeWalle, Chief Justice.

[¶1] TAG Investments and James A. Grettum ("TAG") appealed from a summary judgment in favor of E.W. Wylie Corporation ("Wylie"), granting specific performance of an option agreement. TAG asserts Wylie failed to exercise its option, and alternatively, its exercise of the option was conditional. Wylie timely and unconditionally complied with the option agreement. We affirm.

[¶2] In October 1996, TAG agreed to sell Wylie certain real estate in Cass County. As part of the transaction, Wylie received an option to purchase approximately 114 additional acres from TAG. The real estate consisted of two tracts of land: Tract I was 35.52 acres and Tract II was 78.37 acres of land. The option to purchase required Wylie pay $9,375.00 per acre for the real estate and could be exercised any time before June 1, 2001 at 5 P.M.

[¶3] However, by its terms, exercise of the option required Wylie to make minimum purchases of the option land prior to June 1, 2001. Wylie was required to purchase at least 20 acres of land on or before June 1, 1999 and at least 40 acres on or before June 1, 2000.

[¶4] Within 10 days of Wylie exercising its option for an "Individual Parcel," TAG was required to deliver to Wylie an abstract of title for the parcel. If the abstract of title

failed to disclose a "good and marketable" title, Wylie could declare the option and the exercise or partial exercise thereof null and void. If no objections were made by Wylie to the title, closing was to occur within 45 days of the notice. However, if Wylie objected to title, TAG could be granted up to 120 days to cure the title problems.

[¶5] On May 26, 1999, Wylie gave notice to James Grettum, a general partner of TAG, that it was going to purchase 21.82 acres of land pursuant to the option agreement. The letter, dated May 25, 1999, stated:

> This letter shall serve as our written intention to purchase 21.82 acres in the South portion of Tract II.
>
> Enclosed you will find a Certificate of Survey prepared by Ulteig Engineers describing the acres to be purchased. At your earliest convenience would you please supply us with an updated abstract.
>
> The legal description for the Abstract of Title should match the legal description on the enclosed Certificate of Survey.
>
> Please notify me when the abstract has been prepared so we may proceed with a title opinion. If you would prefer to have us order the abstract please notify me upon receipt of this letter.

[¶6] An abstract of title was obtained by Wylie on June 14, 1999. The abstract revealed an ambiguity in recorded documents and Wylie determined TAG must secure certain quit claim deeds to remove any ambiguities of title. On June 21, 1999, TAG transferred the 21.82 acre plot to Grettum. With closing scheduled for June 28, 1999, Grettum delivered a letter to Wylie on June 25, 1999, stating

he had received the relevant real estate and TAG determined it was free of any obligations under the option to purchase because Wylie had not timely purchased 20 acres on or before June 1, 1999. Grettum was willing to sell the 21.82 acres with the following conditions:

- The purchase price for the sale of the 21.82 acres will be $187,500, less any amounts the City of Fargo may pay me for a road right of way;
- E.W. Wylie Corporation must acknowledge, in writing and in a recordable format, that the Option to Purchase dated October 14, 1996, is no longer in force or effect, and that it has been terminated by its own provisions because of the failure of E.W. Wylie Corporation to make the minimum purchase of 20 acres by June 1, 1999;
- The closing be structured in such a manner that I can take advantage of a Section 1031 like-kind tax free exchange;
- The closing take place on or before July 12, 1999, and I will not be required to do any corrective title work. E.W. Wylie Corporation must accept the property subject to all matters of record on June 2, 1999.

After receiving the letter, Wylie pressed to close on June 28, 1999, but refused to acknowledge the option to purchase had terminated. TAG relented and did not require Wylie to "acknowledge . . . the Option to Purchase dated October 14, 1996, is no longer in force or effect, and that it has been terminated by its own provisions because of the failure of E.W. Wylie Corporation to make the minimum purchase of 20 acres by June 1, 1999." The parties closed

on the 21.82 acre sale, with both parties having contradictory views on the effect of the sale.

[¶7] In early July, Wylie sent letters to TAG and Grettum, notifying them of its intent to exercise its option and purchase the remaining option property. TAG responded that it considered itself free of any further obligations under the option agreement, because Wylie had not tendered the purchase money prior to June 1, 1999. Wylie instituted this lawsuit against TAG and Grettum for specific performance of the option to purchase, alleging breach of contract, estoppel, waiver and fraud. Wylie moved for summary judgment, arguing Wylie had complied with the terms of the Option Agreement and was entitled to specific performance of the option. The district court agreed, granting summary judgment in favor of Wylie.

[¶8] Summary judgment is a procedural device for the prompt and expeditious disposition of a controversy without trial if either party is entitled to judgment as a matter of law, if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. *Twichell v. Treitline*, 1998 ND 10, ¶ 6, 574 N.W.2d 194. On appeal, we review the evidence in the light most favorable to the party opposing the motion for summary judgment. *Id.*

I

A

[¶9] TAG argues Wylie failed to properly exercise the option agreement, pointing out Wylie's exercise was not in precise compliance with the option agreement. TAG, citing *Fries v. Fries*, 470 N.W.2d 232 (N.D. 1991), contends Wylie

did not precisely comply with the option's notice requirement or allow the abstract to be procured in the manner called for in the option.

[¶10] The exercise of an option, just like acceptance of an offer, must be unconditional. *Mason v. Haakenson*, 303 N.W.2d 557, 558 (N.D. 1981). An optionee must exercise the option within the time and upon the terms and conditions provided in the agreement. *Id.* An attempt to exercise an option that deviates from the terms of the option acts as a rejection of the option and counteroffer. *Id.*

[¶11] In *Fries*, this Court held the exercise of an option failed because it deviated from the terms of the option agreement. After Jake and Mary Fries divorced, Jake received 240 acres of their farmland and Mary received 160 acres of farmland. Jake was also given an option to purchase all of Mary's 160 acres. After being diagnosed with cancer, Jake assigned to his seven children his option to purchase Mary's 160 acres. The children attempted to partially exercise the option by purchasing a six-sevenths interest of the property. A majority of this Court held exercise of the option failed because the agreement required full purchase of the entire quarter section. Since the children attempted to purchase only a six-sevenths interest in the quarter section, it was not in "exact compliance" with the option. *Id.* at 234.

[¶12] TAG asserts the option required a certified mailing to TAG, but the mailing went to James Grettum. Thus, Wylie did not precisely comply with the option agreement. This argument is without merit. It is undisputed Grettum is a general partner of TAG and under North Dakota law, notice to a partner is presumed notice to the partnership. N.D.C.C. § 45-13-02(6); *see* N.D.R.Civ.P. 4(d)(2)(D) (stating

a partnership may be served by service to a partner). Considering TAG had no address provided in the option agreement, sending notice to Grettum was certainly reasonable.

[¶13] TAG also asserts Wylie was not in precise compliance with the provision that TAG would deliver a "continued abstract of title" to Wylie. TAG asserts Wylie was in possession of the abstract, but refused to look for it, requiring TAG to obtain a "new" abstract, rather than updating the "old" abstract. One portion of the option agreement refers to TAG paying for the "cost of continuing or preparing the abstract for WYLIE's initial title examination," adding ambiguity to the main premise TAG relies on. Nevertheless, on its face, the argument is still problematic. Nothing in the option agreement suggests exercise of the option was dependent upon the specifics of exactly how the abstract would be procured. Moreover, TAG has given no basis for there being a legal distinction between a "continued" abstract and a "new" abstract.

B

[¶14] TAG's primary argument is that the option contract required Wylie to "purchase" 20 acres by June 1, 1999 and Wylie failed to comply with the option by not tendering purchase money before the deadline expired. TAG cites a dictionary definition of purchase, "to acquire by paying money," to prove tender of money is necessary to effect a purchase. TAG also points out, in support of its argument, the option contains a "time is of the essence" clause. At the outset, we recognize the term "purchase" cannot narrowly be interpreted as always requiring tender of money. *See State v. Jackson*, 515 S.E.2d 386 (Ga. 1999) (defining purchase as

"'to obtain by paying or promising to pay a price'") (quoting *Northeast Factor & Discount Co. v. Mortgage Investments*, 131 S.E.2d 221 (Ga. 1963); N.D.C.C. § 41-01-11(32) (broadly defining purchase as "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift, or any other voluntary transaction creating an interest in property"). We conclude the term "purchase" when construed in light of other provisions in the option agreement, does not require tender of money.

[¶15] A further discussion of option law resolves TAG's argument. An option agreement is a contract where the owner of property (optionor or option-giver) gives another (optionee or option-holder) the right to buy the property at a fixed price within a specified time on agreed terms. *Wessels v. Whetstone*, 338 N.W.2d 830, 832 (N.D. 1983). The owner does not sell the property, but sells to the other party the right, at the optionee's election, to demand the conveyance in the manner specified. *Id.* Put another way, "an option supported by consideration is irrevocable for the life of the offer." *Estate of Jorstad*, 447 N.W.2d 283, 285 (N.D. 1989).

[¶16] Since an option to purchase is merely an irrevocable offer for a limited time, the question is whether Wylie accepted TAG's offer, i.e., whether Wylie exercised the option to purchase. Contract law teaches acceptance comes in different forms, sometimes by performance and sometimes by a promise of performance, often depending upon what the offer specifies. *See Restatement*, Contracts 2d § 50 (1981) (concluding acceptance by performance requires at least part of the offer requests be performed or tendered, but acceptance by promise requires the offeree to complete every act essential to the making of the promise); 17A Am.Jur.2d *Contracts*, § 95 (1991) (stating "there are

various modes of acceptance which are equally conclusive upon the parties"). For instance in a bilateral contract, both parties mutually promise to do a future act and the consideration of the promise of one party is a promise on the part of the other. 17A Am.Jur.2d Contracts § 5. Acceptance in a bilateral contract may be by a promise. *See* 77 Am.Jur.2d *Vendor and Purchaser* § 56 (1997) (stating "if the acceptance requested and furnished is a promise, the contract to sell is bilateral, binding each party to perform his promise").

[¶17] Applying these basic rules to option law, we said in *Northwestern Bell Tel. Co. v. Cowger*, 303 N.W.2d 791, 795 (N.D. 1981), "[w]here the exercise of the option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option." As we said above, an option must be exercised within the time and upon the terms and conditions provided in the agreement. *Mason*, 303 N.W.2d at 558.

[¶18] As TAG points out, the option agreement required Wylie to "purchase 20 acres on or before June 1, 1999." However, under the heading, "Method of Exercise," the option agreement provided how the option was to be exercised:

> Exercise of this option to purchase shall be in writing either delivered to TAG in person or by certified mail prior to the expiration of the time granted by this option as hereinbefore set forth. WYLIE shall have the right to purchase the entire Property or as hereinafter specified portions of the Property (hereinafter referred to as Individual

> Parcel(s)). The notice(s) to exercise the option may hence pertain to a portion thereof and during the term of this Option Agreement. WYLIE may exercise the option as to successive portions of the Property. The notice to exercise this Option Agreement as to an Individual Parcel shall adequately identify the Individual Parcel to be purchased. Following said notice, the area identified will be precisely surveyed for a correct legal description and for determination of the amount of acreage that would determine the purchase price for said Individual Parcel.

The plain language of the option agreement states the option is to be exercised by giving notice to TAG adequately identifying the individual parcel to be purchased. Nothing in the contract requires Wylie to tender the purchase price in order to exercise the option. Thus, tender of the purchase price is an incident of performance, not a condition precedent to the exercise of the option. Because Wylie gave notice to TAG, specifically identifying an individual parcel to be purchased, prior to the June 1, 1999 deadline, it complied with the option to purchase and the fact it did not tender purchase money prior to June 1, 1999 is irrelevant. Although the option agreement has a "time is of the essence" provision, it does not change the option contract into one requiring tender of payment for exercise of the option.

II

[¶19] TAG asserts Wylie failed to exercise the option because its May 25, 1999 letter was only a conditional acceptance, because Wylie could "get out" of the contract if necessary. It is not clear whether TAG is attacking Wylie's acceptance as conditional or whether TAG also challenges

the written option agreement as conditional, but we will consider both arguments.

[¶20] As noted in section I, the exercise of an option must be unconditional. *Mason*, 303 N.W.2d at 558. An optionee must exercise the option within the time and upon the terms and conditions provided in the agreement. *Id.* An attempt to exercise an option that deviates from the terms of the option acts as a rejection of the option and counter-offer. *Id.* Wylie's exercise of the option was unconditional. As the option specified, it gave notice to TAG, specifically identifying an individual parcel to be purchased, prior to the June 1, 1999 deadline. Wylie did not attempt to deviate from the terms of the agreement.

[¶21] TAG suggests Paragraph 13 of the option agreement, which allowed Wylie to void the agreement if several contingencies were not satisfied, gave Wylie the ability to void the agreement at its whim. Thus, they apparently contend, the agreement was conditional and therefore unenforceable. Paragraph 13 states in relevant part:

> If the abstract of title fails to disclose the *title of TAG to be good and marketable or if there are easements, restrictive covenants or mineral grants and reservations of record not acceptable to Buyer as permitted encumbrances, or if there are building zoning laws, ordinances or state and/or federal regulations that would hinder Buyer's intended use of the Property, WYLIE, at WYLIE's election, may declare this option and the exercise or partial exercise thereof null and void*, or WYLIE may offer TAG a reasonable time (but not more than 120 days) in which to make the title good and marketable or the concerns as to the acceptability of easements, restrictive covenants or mineral grants and reservations of record and

> building and zoning laws, ordinances and state and federal regulations addressed to Buyer's satisfaction. No objection can be raised, however, for matters stated to be acceptable in paragraph 19 below. If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE either to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its exercise of this Option Agreement void as to the Individual Parcel selected or to declare the entire Option Agreement void. Any Option Money paid or amount paid for Street Assessment theretofore shall be refunded to WYLIE should WYLIE select the latter option.

(emphasis added). Such "satisfaction" clauses are commonplace in contracts and do not cause the agreement to lack mutuality because, as shown below, an objective standard is nearly always employed in interpreting them. 13 Richard A. Lord *Williston on Contracts* § 38.22 (4th ed. 2000).

[¶22] One treatise says of such clauses:

> Since, however, such a promise is generally considered as requiring a performance which must be satisfactory to him or her in the exercise of honest judgment, such contracts have been almost universally upheld. Because of the duty to act in good faith, a party's promise is not illusory; rather, the restraint that the obligation to act in good faith places on the promisor's discretion

> furnishes good consideration for the parties' agreement.

Id. at § 38.21. According to the Restatement:

> When it is a condition of an obligor's duty that he be satisfied with respect to the obligee's performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.

Restatement (Second) of Contracts § 228. American Jurisprudence states, "If a contract contains a promise by the vendor to sell and one by the purchaser to buy, the fact that it contains a conditional option to one of the parties to rescind does not destroy its mutuality." 77 Am.Jur.2d *Vendor and Purchaser* § 31.

[¶23] This Court has recognized an objective standard is necessary in interpreting clauses similar to those in this case. In *Industrial Com'n v. McKenzie County Nat.*, 518 N.W.2d 174 (N.D. 1994) one party argued an insurance contract was unenforceable because the policy required "good and marketable title" and the failure to have an easement recorded rendered title unmarketable. *Id.* at 178. This Court said marketable title is "one that is free from reasonable doubt." We further stated, "[w]e believe that reasonable persons could not differ that access to this property is free of reasonable doubt" and thus determined the contract should not be rescinded. *Id.*

[¶24] Although the option agreement had several contingencies, an objective standard would be employed to interpret these provisions, if necessary. Wylie had a good-faith

duty to only raise reasonable objections. If it attempted to void the contract at its whim, TAG would have legal recourse to a court which would apply an objective standard to the contract terms. Wylie could not rescind the contract at its whim and the contract is not conditional or illusory.

[¶25] We affirm.

[¶26] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
Ronald L. Hilden, D.J.

[¶27] Ronald L. Hilden, D.J., sitting in place of Kapsner, J., disqualified.

STATE OF NORTH DAKOTA COUNTY OF CASS	IN DISTRICT COURT EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, a Minnesota corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

ORDER

The above-captioned matter came on for hearing before the Court on the 22d day of June, 2000, on Plaintiff's Motion For An Order Declaring that Plaintiff Owes No 2000 Option Money. Sidney J. Spaeth of Vogel, Weir, Hunke & McCormick, Ltd., appeared on behalf of plaintiff. Jonathan T. Garass of Garaas Law Firm, appeared on behalf of defendants.

The Court, having reviewed the memoranda of law, heard the arguments of counsel, and being fully advised in the premises;

It is hereby **ORDERED** that:

The Court declares that pursuant to the terms of the 1996 Option Agreement, Plaintiff is not obligated to make

any Option Payments to defendant to retain rights under the Option Agreement and that Plaintiff's valid and timely exercise of the option in July of 1999 created a binding executory contract for the purchase and sale of real property as found by prior Order of this Court.

Dated this 26 day of June, 2000.

BY THE COURT:

/s/ Frank Racek
Judge of District Court

Filed 12/12/00 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2000 ND 213

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

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20000192

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Frank L. Racek, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for defendants and appellants.

Matrix Prop. Corp. V. TAG Investments
No. 20000192

Per Curiam.

[¶1] TAG Investments and James A. Grettum appealed from a district court's post-judgment order determining that its prior judgment, as affirmed by this Court in *Matrix Properties Corp. v. TAG Investments,* 2000 ND 88, 609 N.W.2d 737, required TAG and Grettum to transfer property in accordance with Matrix Properties Corporation's exercise of an option under the parties' 1996 agreement. We summarily affirm under N.D.R.App.P. 35.1(a)(1). Double costs are awarded to Matrix under N.D.R.App.P. 38 and 39. We further direct the district court to order specific performance requiring TAG and Grettum to convey the subject property upon tender by Matrix of the purchase price set in the 1996 option agreement.

[¶2] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
William F. Hodny, S.J.

[¶3] The Honorable William F. Hodny, S.J., sitting in place of Kapsner, J., disqualified.

Filed 7/13/01 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2001 ND 128

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

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20010060

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Frank L. Racek, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for defendants and appellants.

Matrix v. TAG Investments
No. 20010060

Per Curiam.

[¶1] TAG Investments and James A. Grettum appealed from district court post-judgment orders issued after this Court affirmed an earlier post-judgment order and judgment in *Matrix Props. Corp. v. TAG Invs.*, 2000 ND 213, 622 N.W.2d 432, and *Matrix Props. Corp. v. TAG Invs.*, 2000 ND 88, 609 N.W.2d 737. We affirm under N.D.R.App.P. 35.1(a)(1) and (7). Double costs are awarded to Matrix under N.D.R.App.P. 38 and 39.

[¶2] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
William F. Hodny, S.J.

[¶3] The Honorable William F. Hodny, S.J., sitting in place of Kapsner, J., disqualified.

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

E. W. Wylie Corporation, a Minnesota Corporation, Plaintiff, -vs- TAG Investments, a North DakotaPartnership, and James A. Grettum,an Individual Resident of NorthDakota, Defendants.	) CV-99-2045

Memorandum Opinion on Plaintiff's Motion for Summary Judgment & Defendants 12(b) Motion for Dismissal

I. Introduction

The above-encaptioned matter came before the Court on competing motions for judgment on the 6th day of October, 1999. The Plaintiff appeared through their corporate representative Rob Lyngstad and their counsel of record, Sidney Spaeth of Fargo, North Dakota. The Defendant James A. Grettum appeared personally and is his capacity as a general partner for TAG Investments and through his counsel, David Garaas and Jonathan Garaas of Fargo, North Dakota.

This matter was commenced by service of a summons and complaint on July 9, 1999. The Defendants interposed an Answer and Counterclaim on the 29th of July, 1999.

On August 20, 1999, the Plaintiff moved for summary judgment. On September 17, 1999, the Defendants filed a Brief in Resistance to Motion for Summary Judgment and moved, under Rule 12(b) of the North Dakota Rules of Civil Procedure, for entry of a Judgment of Dismissal of all claims of Plaintiff.

A hearing was conducted on October 6, 1999. The Court, being fully informed in the premises, now renders this Opinion.

Because the Court is convinced that there are no questions of material fact and that the Plaintiff is entitled to judgment as a mater of law, hereby GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendant's Motion for Dismissal.

II. Facts

While the legal consequences of the facts are seriously disputed by the parties, the facts themselves are relatively straight forward and not the subject of dispute. E.W. Wylie (now known as "Matrix, Inc.") purchased from TAG Investments certain real estate located in Fargo, North Dakota in October of 1996. As a part of this transaction, E.W. Wylie also purchased from TAG Investments an option to purchase 114 acres of additional land located in Fargo. *Affidavit of Rob Lyngstad*, ¶ 2, E.W. Wylie v. TAG Investments, et al, CV-99-2054, Clerk's Docket #8 (Aug. 18, 1999). The option was executed in the form of a document entitled "Option to Purchase" dated October 14, 1996. *Id.* The Option to Purchase gave to E.W. Wylie the option to purchase the 114 acres, or portions thereof, at the price of $9,375 per acre. *Id.* at Exhibit "A" ¶¶ 1-2. The time established for E.W. Wylie to exercise its option was

"for the period of time from the date hereof to the 1st of June, 2001 at 5:00 p.m. *Id.* at Exhibit "A" ¶ 3. The Option to Purchase required E.W. Wylie to make certain minimum purchases by certain dates in order to maintain the option. *Id.* at Exhibit "A" ¶ 6. Under the terms of the agreement, E.W. Wylie was to purchase at least 20 acres before June 1, 1999 and at least an additional 20 acres before June 1, 2000. *Id.* Thus, in order to preserve the option E. W. Wylie was required to purchase a minimum of 40 acres before June 1, 2000.

The method of exercising the option was set forth in the Option to Purchase. Paragraph 4 of the Option to Purchase provides:

> **4. *METHOD OF EXERCISE:*** Exercise of this option to purchase shall be in writing either delivered to TAG in person or by certified mail prior to the expiration of the time granted by this option as hereinbefore set forth. WYLIE shall have the right to purchase the entire property or as hereinafter specified portions of the Property (hereinafter referred to as Individual Parcel(s)). The notice(s) to exercise the option may hence pertain to a portion thereof and during the term of this Option Agreement as to an Individual Parcel shall adequately identity the Individual Parcel to be purchased. Following said notice, the area identified will be precisely surveyed for a correct legal description and for determination of the amount of acreage that would determine the purchase price for said Individual Parcel.

Id. at Exhibit "A" ¶ 4. Once the option was exercised, TAG was required to provide an abstract of title to E. W. Wylie. *Id.* at Exhibit "A" ¶ 13. If no objections to title were raised by E.W. Wylie, "the closing shall occur within forty-five

(45) days of said notice of exercise of this Option Agreement or partial exercise as to an Individual Parcel(s), unless such time shall be extended by the mutual consent of the parties." *Id.* at Exhibit "A" ¶ 14. If there were objections to title, TAG had 120 days to clear the defect. *Id.* at Exhibit "A" ¶ 13. If title defects arose, closing would occur within five (5) days of the time that the title defect had been cleared. *Id.* at *Exhibit* "A" ¶ 14.

On April 28, 1999 E.W. Wylie informed James Grettum, a general partner in TAG Investments, in writing, that "prior to June 1, 1999 we will be notifying you regarding our intent to option at least 20 acres in the south portion of Tract II. We will provide you with a detailed legal description at that time." *Id.* at Exhibit "B".

On May 26, 1999, E.W. Wylie exercised the option by providing written notice by certified mail to James A. Grettum and TAG Investments that it was exercising its option to purchase 21.82 acres in the South portion of Tract II. *Id.* at Exhibit "C". Attached to the letter was a "Certificate of Survey" by Ulteig Engineering describing the property to be purchased as:

> The South 721.58 feet of the southeast quarter of the southwest quarter of Section 22, Township 139 North, Range 49 West, of the Fifth Principal Meridian, Cass County, North Dakota. Containing 21.82 acres more or less and subject to all existing easements and rights of way.

Id. The letter also requested that TAG provide E.W. Wylie with an updated abstract of title that would "match the legal description on the enclosed Certificate of Survey." *Id.*

An abstract of title was obtained on or about June 14, 1999. E.W. Wylie proceeded to obtain a title opinion and

identified a defugalty in the recording documents. The ambiguity required the execution of quit claim deeds by an underlying optioner and TAG's two other general partners – Thomas Richards and R. Allan Rostad. TAG cooperated in the execution of the necessary documents before June 25, 1999. *Id.* at ¶ 6.

For reasons which have not been fully explained, TAG Investments transferred all of their interest in the 21.82 acres to James Grettum on June 22, 1999. This transfer was made without giving any notice or explanation to E.W. Wylie.

During the course of preparing for the closing E. W. Wylie discovered that the transfer had been made to Grettum. They made reasonable inquiries of TAG Investments and were informed that the transfer was made for internal purposes of TAG Investments and would not affect closing or transfer of the property to E.W. Wylie.

The closing was scheduled to take place on the morning of Monday, June 28, 1999. On Friday, June 25, 1999 at about 4:30 p.m. James Grettum hand delivered a letter to E.W. Wylie. The letter purported to "set forth my position, and TAG Investment's position, in reference [to the identified 21.82 acre parcel of land.]" *Id.* at Exhibit "H".

The letter went on to inform E.W. Wylie:

> I became the owner of the above described real property on June 22, 1999, pursuant to a Warranty Deed given by TAG Investments, a North Dakota General Partnership. At the time I was deeded the above described property, TAG Investments determined it was completely free of any further obligations under an Option to Purchase executed by TAG Investments, as Optioner,

to E.W. Wylie Corporation, as Optionee, on October 14, 1996. TAG Investments believed that E.W. Wylie Corporation lost its interest in the Option to Purchase by not timely purchasing 20 acres on or before June 1, 1999. The Option to Purchase is quite clear that it was subject to an obligation on the part of E.W. Wylie Corporation to purchase 20 acres before that date and that "time was of the essence" in the Option to Purchase.

As the grantee of TAG Investments, a general partnership, I will be prepared to strive to smooth and clear the muddy waters between TAG Investments and E.W. Wylie Corporation. I am willing to allow E.W. Wylie Corporation to purchase the above-described real property that had been deed[ed] me by TAG Investments, a general partnership.

Presently I am not prepared to sell at this time unless the following terms and conditions are also agreed to by E.W. Wylie Corporation:

1. The purchase price for the sale of the 21.82 acres will be $187,500.00, less any amount the City of Fargo may pay me for a road right of way;

2. E.W. Wylie Corporation must acknowledge, in writing and in a recordable format, that the Option to Purchase dated October 14, 1996, is no longer in force or effect, and that it has been terminated by its own provisions because of the failure of E.W. Wylie Corporation to make the minimum purchase of 20 acres by June 1, 1999;

3. The closing be structured in such a manner that I can take advantage of a Section 1031 like-kind tax free exchange;

4. The closing take place on or before July 12, 1999, and I will not be required to do any corrective title work. E.W. Wylie Corporation must accept the property subject to all matters of record on June 2, 1999.

Kindly advise me if these terms are acceptable if E.W. Wylie continues to desire to purchase the above described real property. I am signing this letter individually, and as general partner of TAG Investments, to set both my individual position and the position of the partnership with reference to all matters stated herein.

Very truly yours,

/s/
James A. Grettum

Id. at Exhibit "H".

The closing of June 28, 1999, was something of a circus, with Mr. Lyngstad tearing up the Grettum letter and informing Grettum, his lawyers, and his agents that the attempt by TAG Investments to avoid the Option to Purchase was a legal nullity. *Id.* at ¶ 15. Attention then turned to the closing documents, where E.W. Wylie inscribed the following:

By signing this closing statement and receiving [t]he deed hereunder, E.W. Wylie Corp. does not accept, and in fact, expressly rejects, the statements and conditions attempted to be unilaterally imposed on this transaction pursuant to a letter

> from James A Grettum to E.W. Wylie Corporation dated June 25, 1999 and E.W. Wylie expressly reserves full rights under the Option to Purchase between it and TAG Investments, as originally executed.

Id. at Exhibit "I".

At that point Grettum proceeded with the sale of the 21.82 acres and accepted and cashed the check of E.W. Wylie. *Id.* at ¶ 16. Closing occurred 34 days after E.W. Wylie exercised its option on the 20 acre purchase, well within the 45 day period allowed by the Option to Purchase.

Realizing the legal quagmire into which they had been thrust, E.W. Wylie sent certified letters to TAG Investments and James Grettum on July 1, 1999 and July 2, 1999, respectively, exercising its option to purchase the remaining portion of the option property. *Id.* at ¶ 17 and Exhibit "J".

TAG Investments and James Gretturn responded on July 6, 1999, declaring that they considered themselves "completely free of any further obligations" under the Option Agreement. *Id.* at Exhibit "K". The letter stated that E.W. Wylie "lost its interest in the Option to Purchase by not timely *purchasing* 20 acres on or before June 1, 1999." *Id.* (emphasis in original). The letter further cited *The New Lexicon Webster's Dictionary of the English Language* (1989) as standing for the proposition that the English language plainly and unambiguously means "to acquire by paying money." TAG Investments and James Grettum assert that the failure to pay the purchase price before June 1, 1999 caused the Option to Purchase to lapse by its own terms on June 1, 1999 and that they were

under no obligation to sell E.W. Wylie anything, including the 21.82 acres that Grettum transferred on June 28, 1999.

The Plaintiff contends that they properly exercised the option to purchase the entire tract of land and that Defendants are obligated to perform under the Option to Purchase dated October 14, 1996.

The Defendants argue that the October 14, 1996 Option to Purchase lapsed by its own terms on June 1, 1999. They assert in support of this argument:

(1) The term "purchase" is clear and unambiguous and means "to acquire by paying money,"

(2) The Option to Purchase contains [two] paragraphs, 13 and 20 which render the contract illusory; and

(3) If the definition of "purchase" is as asserted by the Plaintiff, it is impossible for the transaction to be treated as a tax free exchange under the Internal Revenue Code rendering the exercise by E. W. Wylie a material breach of the Option to Purchase which clearly contemplates that the parties act in a manner such that favorable IRS treatment can be received.

III. Discussion

1. Summary Judgment Generally

Under Rule 56, N.D.R.Civ.P., a summary judgment should be granted only if it appears that there are no issues of material fact or any conflicting inferences which may be drawn from those facts. *See, Production Credit Ass'n of Minot v. Klein*, 385 N.W.2d 485 (N.D. 1986). The party seeking summary judgment has the burden to clearly

demonstrate that there is no genuine issue of material fact. *Binstock v. Tschider*, 374 N.W.2d 81, 83 (N.D. 1985). In considering a motion for a summary judgment, the court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence to determine whether summary judgment is appropriate. *Everett Drill. Vent v. Knutson Flying Serv.,* 338 N.W.2d 662, 664 (N.D. 1983). The court must view the evidence in a light most favorable to the party opposing the motion and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. *See, Stokka v. Cass Cty. Elec. Co-op, Inc.*, 373 N.W.2d 911 (N.D. 1985). Courts must also consider the substantive standard of proof at trial when ruling on a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *State Bank of Kenmare v. Lindberg*, 471 N.W.2d 470, 474 (N.D. 1991).

The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other documents containing testimony or evidence raising an issue of material fact. *Smith v. Land O'Lakes*, 1998 ND 219, ¶ 10; 587 N.W.2d 173 (N.D. 1998). Neither the trial court, nor an appellate court has a duty or responsibility to search the record for evidence opposing the motion for summary judgment. *Id.*

Summary judgment is proper when a party fails to raise even a reasonable inference of the existence of an element essential to the party's claim, which must be proved at trial. *Matter of Estate of Stanton*, 472 N.W.2d

741 746 (N.D. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

In the instant case all parties agree that there are no questions of fact and that this case is appropriately determined on the pleadings. The Court agrees.

A. The Nature of the Option and its Exercise

The option in this case is a contract in the nature of a formal offer by TAG Investments to sell certain described real estate, totaling 114 acres, to E.W. Wylie Corporation for the sum of $9,375 per acre. The option was supported by consideration in the form of money. E.W. Wylie paid an annual fee to maintain the option. In addition to the general offer to sell the entire 114 acre parcel, the option required that E.W. Wylie make minimum purchases of 20 acres by June 1, 1999, and an additional 20 acres by June 1, 2000 (for a total minimum interim purchase[ ] of 40 acres). If the minimum purchases were made, the entire option had to be exercised by June 1, 2001, by 5:00 p.m.

Thus, the option was in the nature of an offer which could be accepted by E.W. Wylie by exercising the option consistent with its terms (including the minimum purchases).

Paragraph 4 of the Option to Purchase provides that "exercise of this option to purchase shall be in writing either delivered to TAG in person or by certified mail prior to the expiration of the time granted by this option as hereinbefore set forth." Option to Purchase, ¶ 4.

It is undisputed that on May 25, 1999, Rob Lyngstad in his capacity as Vice President of the Plaintiff, sent, by Certified Mail, a letter wherein E.W. Wylie indicated that

it was exercising its option to purchase 21.82 acres of the "South portion of Tract II." The land was specifically described as required by the Option to Purchase. It is not open to dispute that this occurred before June 1, 1999.

At the outset it should be noted that TAG Investments asserts that the letter of May 25, 1999, is ineffective as an exercise of the Option to Purchase because it was sent to James Grettum at his place of business and because the letter was addressed to James Grettum, CPA, Grettum and Company, PO Box 9121, Fargo, ND 58103. James Grettum has admitted in his Answer and Counterclaim that he is a general partner in TAG Investments. *Answer and Counterclaim*, ¶ 2, E.W. Wylie v. TAG Investments, et al., CV-99-2054, Clerk's Docket #4 (July 28, 1999).

North Dakota law provides that notice is given to a partnership when it is given " . . . to a partner of a partnership when in writing and mailed or delivered to the partnership or to a partner at the chief executive office of the partnership." N.D. CENT. CODE § 45-13-01(8)(a) (Supp. 1999). The Century Code further states that "a person receives a notification when the notification comes to the person's attention or is duly delivered at the person's place of business . . . " N.D. CENT. CODE § 45-13-02(4) (Supp. 1999). The Rules of Civil Procedure also allow for the service of process on a general partner of the partnership. Rule 4, N.D.R.Civ.Pro. (1999).

James Grettum has admitted receiving the May 25, 1999, letter and has attached a copy of it to the Defendants Answer and Counterclaim. *Answer and Counterclaim.* ¶¶ 6-7, E.W. Wylie v. TAG Investments, et al., CV-99-2054, Clerk's Docket # 4 (July 28, 1999). The record is silent as to the "chief executive office of the partnership."

However, given the nature of the partnership as an investment partnership, it seems unlikely that it has a regular place of business. The Option to Purchase has an address for E.W. Wylie but is silent as to the address for TAG Investments, thus it appears that the parties believed *ab initio* that service of the notice of exercise of option could be made by giving notice to any of the general partners.

In view of the facts and circumstances in this case, including Mr. Grettum's admission that he received the letter of May 25, 1999, the Court has no difficulty determining that the manner of the exercise of the option, that is by sending a certified letter to Mr. Grettum, was appropriate.

B. Are Defendants Correct in their Assertion that Payment is Synonymous with Purchase?

The main thrust of the Defendants' argument is that the term "purchase" is clear and unambiguous and that it means "to acquire by paying money." The sole authority for this proposition is *The New Lexicon Webster's Dictionary of the English Language* (1989). While a case precisely on all fours has not been decided by the North Dakota Supreme Court, the Court has stated:

> Where the exercise of an option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option.

Northwestern Bell Telephone Co., v. Cowger, 303 N.W. 2d 791, 795 (N.D. 1981). It is clear that the Option to Purchase

in this case does not require payment coincident with exercise of the option, the document plainly allowing that the closing (the time at which the money is exchanged for the deed) must occur within 45 days following exercise of the option (and up to 125 days if a title problem needs to be resolved). Thus, under North Dakota law it would appear plain that in this case "payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option."

This is consistent with the North Dakota Supreme Court's ruling in *Kuhn v. Hamilton*, 117 N.W.2d 81 (N.D. 1962), wherein the Court stated, "In *Horgan v Russell*, 140 N.W. 99 (N.D. 1913), we held that acceptance of an offer or option which results in a contract so brought into being are different matters." *Kuhn* at 117 N.W.2d 83. In *Kuhn* the Court went on to state:

> On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take that land – the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. In the one case there is an election to sell upon payment of the purchase price, which is a condition precedent to the foundation of the contract; and on the other, there is an election to take the land upon the terms proposed; payment of the purchase price being condition subsequent, or rather the performance of an executory contract therefore entered into.

Id. at 83-84 (citing *Horgan v Russell*, op. cit.). This is consistent with the North Dakota Supreme Court's holding in *Olson v. Bradawl*, 123 N.W.2d 169 (N.D. 1961) where

the high court stated that the exercise of an option creates an executory bilateral contract. *Id.* at 178.

Thus, it seems plain under the precedent of North Dakota, that an option is in the nature of an irrevocable offer to be bound, supported by consideration, which may be accepted by exercise of the option. The exercise of the option gives rise to an executory contract. In this case, the nature of the executory contract is defined by the terms of the Option to Purchase which allowed 45 days to close the deal from the date of the exercise of the option.

This view is consistent with decisions from other jurisdictions. In *Loose v. Brubacher,* 549 P.2d 991 (Kan. 1976) the Kansas Supreme Court confronted a case somewhat similar to the case at bar. The Kansas high court noted, "[p]ayment or tender of the contract price is not essential to acceptance, unless the option agreement makes it a condition precedent to or a part of or necessary to the exercise of the option. In such a case payment may be made within a reasonable time after acceptance." *Id.* at 996.

In *Loose* the argument was advanced, as it is in the case at bar, that "time is of the essence" in option contracts. The Kansas court agreed stating "[t]ime has been held to be of the essence in an option agreement whether or not so expressed and the optionee must accept in the time specified in order to bind the optioner to the contract of sale." *Id.* at 996.

It can not be disputed in this case that time is of the essence, as the Option to Purchase specifically provides that it is. Paragraph 21 of the Option to Purchase provides:

> **21. TIME OF THE ESSENCE:** The parties expressly agree that time shall be of the essence in the performance of the parties under this agreement.

In order to understand the impact of this provision, one needs to consider the "performance" considered under the option agreement. At this point the case diverges from many reported option cases. *See*, *Loose v. Brubacher*, 219 Kan. 727; 549 P.2d 991 (Kan 1976) (time of the essence in the exercise of option not in performance of the contract); *See also*, *Northern Illinois Coal Co. v. Cryder*, 197 N.E. 750 (Ill. 1935) ("Time was of the essence of the option but was not of the essence of the performance of the contract."). In this case the option agreement sets forth a clear timeline of the contemplated performance. The essential parts of the agreement are:

1. On or before June 1, 1999, E.W. Wylie was required to exercise the option to purchase of a minimum of 20 acres as an identified parcel;

2. Within 10 days TAG Investments was to deliver an updated abstract of title to the identified parcel;

3. E.W. Wylie had 15 days from the date of delivery of the abstract of title to determine whether the title was good and marketable and free from defects;

4. Closing must occur within 45 days of the date of exercise of the option unless there were title defects in which case TAG Investments had a reasonable time not to exceed 120 days to cure title defects. If there were title defects closing would occur within five days of the date that the defects were cured.

It appears to the Court that these were the matters for which time was of the essence as each are essential in closing the entire arrangement in a timely fashion. In reviewing the evidence it is clear that (1) E.W. Wylie exercised the option by its correspondence of May 25, 1999, before June 1, 1999; (2) the abstract was obtained within a reasonable time; (3) E.W. Wylie notified TAG Investments of the defects of title within 15 days of the date that they received the abstract of title; (4) TAG Investments cleared all title questions by June 25, 1999; (5) closing occurred on June 28, 1999. Thus, the entire process from the date of exercise until the date that the transaction was closed took 34 days, well within the 45 days allowed by the option agreement. The Option to Purchase clearly states that closing could occur at any time up to 45 days after the exercise of the option, thus, even reading the "time of the essence" clause in a light most favorable to TAG Investments and against E.W. Wylie reveals that the time concerns of the optioners were met. The optioners made an offer wherein they agreed that the optionees would have forty-five days from the date of exercise of the option to close the transaction. This time frame was met in the instant case, even though there were defects of title that needed to be cured. These defects of title were cured by TAG Investments on June 25, 1999 and on June 28, 1999 the transaction was closed, well within the five day period allowed for closing after the title defects had been resolved. Thus, it is apparent that all of the necessary performance by E.W. Wylie was accomplished within the time parameters set forth in the Option to Purchase. Thus, any claim that the payment in the case at bar was not made timely and that payment was contrary to the time of the essence clause is without merit.

In considering the dispute regarding "purchase" means "payment", it is important to bear in mind the legal impact of the notice of intent to exercise an option. As the Kansas Supreme Court went on to state in *Loose v. Brubacher,* "a majority of jurisdictions including Kansas have held that notice of an intent to exercise an option is sufficient to bind the optioner." *Id.* at 996. This conclusion directly related to the claim of Brubacher that the option could only [be] exercised by tender of the purchase price.

Likewise, the South Dakota Supreme Court has indicated that "payment and purchase are not synonymous terms." *Schull Construction Co. v. Webster Ind. School Dist. 101*, 198 N.W.2d 512, 516 (S.D. 1972). As the South Dakota Court noted, "there is a clear distinction between payment and purchase. Payment extinguishes and discharges an indebtedness; purchase transfers title thereto the payor or nominee." *Id.*

Regardless of the dictionary definition, the law does not view the term "purchase" in a colloquial sense, it is a legal term with a precise legal meaning. In the law relating to option contracts, purchase and payment are not synonymous terms. Purchase in an option context means an irrevocable acceptance of the offer by exercise of the option consistent with its terms. This act irrevocably binds the parties and has the impact of transferring equitable title in the underlying real estate to the optionee. In the case at bar, E.W. Wylie had until June 1, 1999 to exercise the option by forwarding the appropriate notice, clearly indicating its willingness to be bound and plainly describing at least a 20 acre parcel to be purchased. This E.W. Wylie did. Having exercised the option, they were required to close the purchase within 45 days. They closed within 34 days, well within the time allowed for performance.

This is made even more plain by reducing this option to its legal consequences. First, the option was an offer, bound by consideration, irrevocable during the time of its existence, to sell certain real estate to E.W. Wylie for a specified price. The option expressly allowed that the minimum purchase had to be exercised by June 1, 1999. E.W. Wylie exercised the option on May 25, 1999 by forwarding a letter, by certified mail, to James Grettum a general partner of TAG Investments. The exercise constituted an acceptance of the offer of TAG Investments to sell and the creation of an enforceable obligation on the part of E.W. Wylie to buy 21.82 acres of land located in Tract II for the sum of $9,375 per acre. Once the exercise of the option occurred an executory contract arose. The terms of the executory contract were, as previously indicated, that TAG Investments agreed to sell 21.82 acres in Tract II to E.W. Wylie at the price of $9,375 per acre. The executory contract included a term that the transaction must close within 45 days. At the closing, the bargained for exchange must take place. That is, TAG Investments had to deliver a deed for the property and E.W. Wylie had to pay the agreed upon purchase price. All of these things occurred in natural order consistent with the terms of the executory contract. This executory contract was bilateral involving TAG's delivery of a deed and Wylie's payment of the purchase price. If the Option to Purchase and the executory bilateral contract are viewed in their proper legal place, it is apparent that the conduct of E. W. Wylie was entirely consistent with the express provisions of the Option to Purchase of October 14, 1999.

The Defendants' argument that the tender of the purchase price was required before June 1, 1999, is simply based on an incomplete understanding of the applicable

law, as is demonstrated by a close reading of *Kuhn* and the legal concepts which naturally flow from it.

C. Do Paragraphs 13 and 20 Render the Option Illusory?

Paragraph 13 of the Option to Purchase provides:

> **13. ABSTRACT OF TITLE.** Within 10 days after Wylie has exercised its option for the Property or for an Individual Parcel hereinabove provided, TAG shall deliver to WYLIE or WYLIE'S attorney, a continued abstract of title for the Property or for such Individual Parcel. TAG shall pay the cost of such abstract preparation(s). Said abstract(s) of title shall show TAG's title to be good and marketable subject only to restrictive covenants, mineral reservations and grants and easements of record (provided such are acceptable to Buyer as permitted encumbrances), as well as zoning ordinances and other governmental regulations affecting the Property. WYLIE shall then have 15 days after continuation of said abstract to examine the title and to accept the same if the title is good and marketable. If the abstract of title fails to disclose the title of TAG to be good and marketable or if there are easements, restrictive covenants or mineral grants and reservations of record not acceptable to Buyer as permitted encumbrances, or if there are building zoning laws, ordinances or state and/or federal regulations that would hinder Buyers's intended use of the Property, WYLIE at WYLIE's election, may declare this option and the exercise or partial exercise thereof null and void, or WYLIE may offer TAG a reasonable time (but not to exceed 120 days) in which to make the title good and marketable or the concerns as the acceptability of easements, restrictive covenants or

> mineral grants and reservations of records and building and zoning laws, ordinances and state and federal regulations addressed to Buyer's satisfaction. No objection can be raised, however for matters stated to be acceptable in paragraph 19 below. If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE either to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its exercise of this Option Agreement void as the Individual Parcel selected or to declare the entire Option Agreement void. Any Option Money paid or amount paid for the street Assessment theretofore shall be refunded to WYLIE should WYLIE select the latter option.

Defendants assert that the power granted to E.W. Wylie to void the exercise of its option after an examination of title is so broad as to render the entire option illusory. It is beyond dispute that Wylie has broad power under this provision to reject title as being unmarketable. However, this power is nowhere near as broad as asserted by the Defendants.

First, it is limited by Paragraph 19 of the Option Agreement. Paragraph 19 states that Wylie has examined the title on the date of the creation of the option and that it has found the title to be marketable. It also states that any easements, covenants, conditions and restrictions that would affect title to the property would have to be agreed to in writing by Wylie during the existence of the option.

Thus, many of the concerns considered in Paragraph 13 simply could not have arisen without the prior consent of Wylie which would obviously negate the ability of E.W. Wylie to object under paragraph 13.

It is also important to bear in mind that every contract[1] has within it, *implied in law*, a covenant of good faith and fair dealing.[2] Wylie was not free to erect pretended

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[1] This statement is perhaps overbroad. Contracts of employment do not contain the same covenants of good faith and fair dealing, implied in law, as other contracts. This is due to the fact that North Dakota is an "employee at will" state and the statutes of North Dakota specifically provide that one may be terminated from employment for any reason, or even no reason at all, so long as the reason is not unlawful. Thus, the implied covenant of good faith and fair dealing has only limited applicability in the employment arena – the legislature having limited the implied covenant by legislative dictate. Needless to say, this concept is not at issue in a case involving an option to purchase real estate.

[2] Unfortunately, the North Dakota Supreme Court in its opinion in *Barnes v. St. Joseph's Hospital*, 1999 N.D. 204, appears to intimate that the implied covenant in contract known as "the implied covenant of good faith and fair dealing" refers to a tort concept. The Court is not convinced that this is what the North Dakota Supreme Court meant to say. There is a tort cause of action, which has been recognized as an action for "breach of implied covenant of good faith and fair dealing" in a number of jurisdictions. This is a free standing tort action arising out of a contractual relationship and actually involves something akin to tortiously breaching a contract. This is not what the Court refers to today in this opinion. Rather there is an implied covenant of good faith and fair dealing implied in every contract. As the Supreme Court of North Dakota has noted, the contractual duty to "act in good faith 'does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions,' nor does the duty of good faith 'inject substantive terms into the parties' contract.'" *Barnes v. St. Joseph's Hospital*, 1999 N.D. 204 ¶ 14. Rather, the implied covenant of good faith and fair dealing implied in contracts by law requires that in the performance of the contract, one has an obligation to act in good faith, deal fairly with

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the other party and to use their best efforts in performance of the contract. This is a contract principle, not a tort principle, and it may be used to enforce the terms of the contract as it exists. The practical impact of this is that a party cannot act in bad faith, use less than best efforts, or deal unfairly in the performance of the contract to avoid the obligations imposed by the contract. In the case at bar this means that both parties must act with due diligence, in good faith and use their best efforts to comply with the terms of the contract. One simply cannot create straw obstacles and then claim they are not bound to perform the contract. The concept is, as the Court has noted three times now, a fundamental contract principle and not a separate free standing tort. For a discussion of this theory, the court commends *Amoco Oil Co. v. Ervin,* 908 P.2d 493, 498 (Colo. 1995) (recognizing the implied covenant in contract but denying the existence of the tort claim). As an aside, the Court notes that the implied covenant in contract is entirely consistent with the underlying contract principle of giving each party the benefit of their bargain. The tort theory of breach of implied covenant of good faith and fair dealing, however, is economically inconsistent with the fundamental principles covering contract law because rather than giving the parties the benefit of the bargain, the tort concept also includes the tort notion of allowing the recovery consequential damages – a wholly unproductive economic result. In allowing tortious breaches of contracts and awarding consequential damages, the law imposes a societal cost by increasing the damages in an economic setting which results in the cost of those damages being spread to all consumers of the goods and services involved. Because as a general principle consequential damages are limited in contract to those case[s] in which they were clearly contemplated by the parties at formation of the contract and foreseeable in the breach, the societal cost of damages is less in contract than in tort. There is a fundamental philosophical reason for this result: The law does not view the breach of a contract by a "dirty rotten breacher" as involving the same moral implications as the commission of a tort by a tortfeasor. Torts necessarily involve wrongful conduct, while the breach of a contract may be economically necessary and not involve any notion of underlying immorality. Thus, in contract, the goal is generally to give the non-breaching party the benefit of their bargain either in money damages or through specific performance. In tort, the goal is compensate an innocent party for *all* damages which flow naturally and proximately from the wrongful conduct. Thus, in this judge's opinion the mixing of tort and contract principles is an avenue fraught with danger, uneconomical, and harmful to the societal interest

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defugalities of title with a view to avoiding the exercise of their option, because to do so would violate the implied covenants of good faith and fair dealing. Any court that would have been confronted with a claim of defective title or that the property had been rendered unfit for the purposes intended by E.W. Wylie would have been empowered to examine the underlying basis for these claims and determine whether or not the claimed defects were real or simply a pretense for avoiding the consequences of the exercise of the option. Since the Court possesses the power to enforce the implied covenants, if E.W. Wylie had actually raised pretended defects of title as a pretense to avoid the legal consequences of an exercise of the option, TAG Investments would have been empowered to seek specific performance. Had they established that the claimed title irregularities were pretextual, they might have been entitled as a matter of law to specific performance as a remedy, but in any event they would have been entitled to money damages to give them the benefit of their bargain. In any event, the Court is convinced that the powers granted to E.W. Wylie under paragraph 13, while broad, are not of such a nature as to render the option agreement illusory.

The Defendants also assert that Paragraph 20 renders the option agreement illusory. Paragraph 20 is a liquidated damages provision which makes plain that if E.W.

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in providing goods and services at the least possible cost to consumers. Thus, an award of tort damages in a contract setting should be avoided except in those cases where the conduct is so egregious as to rise to the level of a tort which actually justifies the imposition of tort damages. The North Dakota Supreme Court has indicated in *Barnes* that this is [a] question that should wait for another day and so it must in this case as well.

Wylie fails to exercise the option they forfeit the option money paid and the money advanced for Street Assessment payments as liquidated damages. It simply states that the parties have tried to ascertain damages inherent in a breach, that it is impossible to do so in advance, and that they agree that all sums paid prior to a failure to exercise the option are forfeited upon said failure to exercise. The Court does not see how this provision, even if read in concert with Paragraph 13, can render the option agreement illusory.

E. Section 1031 of the Internal Revenue Code

The Defendants' further assert that if E.W. Wylie prevails in its interpretation of the issue relating to the synonymity of purchase and payment, Section 1031 of the Internal Revenue Code operates to bar the tax free exchange contemplated by the parties which would render the entire agreement void for a failure of consideration. The Court is of the opinion that the Section 1031 claim by the Defendants is an unmitigated red herring.

The IRS regulations concerning deferred exchanges discuss the taxpayer's duty to identify the like-kind exchanged property within 45 days and exchange the property within 180 days of the transfer of property. I.RC. §1.1031(k)-1(b)(2)(i) and (ii). At the outset it should be noted that the comments to the section plainly state that it is inapplicable to transactions in which property is exchanged for money. Clearly, nothing in this case ever contemplated that E.W. Wylie would ever have done a like kind exchange of property with TAG Investments rather than the payment of money. Thus, it is apparent from all the circumstances in this case that the applicability of

section 1031 required very delicate handling and planning. It appears to the Court that the federal tax regulations may allow Section 1031 to be used if the parties transfer the real property in question through a qualified intermediary. This E.W. Wylie was always ready willing and able to do. Frankly, this type of exchange appears to the Court to be quite arcane and possibly fraught with danger to the unwary, but if handled in a sophisticated manner it appears possible to accomplish. But, that does not change the circumstances that are apparent in the contract that the bargained for exchange was in fact a deed for cash.

Now, Defendants make much of the fact that E.W. Wylie had to cooperate with them to create a tax free exchange under Paragraph 28 of the Option to Purchase. The Court claims no expertise in the area of tax law, but its reading of the Code of Federal Regulations leads it to an apparently inescapable conclusion that by the time Mr. Grettum appeared at the closing, TAG Investments and Mr. Grettum had created, by their maneuvering, a problem with Section 1031 treatment for TAG Investments, if not for Mr. Grettum personally. The reasons for the transfer of the 21.82 acres to Mr. Grettum has never been adequately explained, and the record is silent as to whether or not he could be a qualified intermediary of TAG Investments, but a reading of the relevant regulations appears to yield the conclusion that this transfer of real estate might well have created a tax problem for the partners of TAG Investments, other than James Grettum. It all depends on how the underlying transaction between TAG Investments and James Grettum was structured. The Court has no information regarding the structure of this transaction, but the deed appears to raise some questions about whether or not it would still be possible for TAG

Investments to preserve their tax position once they transferred the property by warranty deed to James Grettum.

In any event, by the time the transaction was closed TAG Investments and James Grettum had created a potential problem with 1031 treatment; had never provided a reasonable explanation of how the closing could be structured to protect their tax position; and never provided clear direction on who was a qualified intermediary such that E.W. Wylie could assist in the preservation of their tax position. All of these point to a problem of the defendants own making. In *Barnes v. St. Joseph's Hospital,* 1999 N.D. 204, ___ N.W.2d ___ (N.D. 1999), the North Dakota Supreme Court stated: "This Court has recognized that each party to a contract impliedly agrees not to prevent the other party from performing and not to render performance impossible. *See, Cavalier County Memorial Hospital Ass'n v. Kartes,* 343 N.W.2d 781, 784 (ND 1984); *Ireland v. Charlesworth,* 98 N.W.2d 224, 233 (N.D. 1959). If one party prevents the other's performance, it excuses the performance and provides a defense in a suit for breach by such nonperformance." ¶ 16. By not providing E.W. Wylie with the information that they needed to protect the Defendants tax position, the Defendants breached the implied covenant recognized by the North Dakota Supreme Court in *Barnes* and *Kartes*. Simply put, by transferring the real estate to a person who might not be a qualified intermediary and by not providing E.W. Wylie with adequate information on which to act to preserve the Defendants' tax position, the Defendants excused compliance with this provision.

Even more importantly, the Court fails to see how the precise definition of "purchase" as being different than "a

paid for exchange" implicates TAG Investment's tax position in any manner. It appears that the actual sections of the C.F.R. in the Defendants brief have only limited applicability, and are unlikely to be determinative of the tax positions of TAG Investments. This picture is further complicated by the rather inexplicable transfer of the 21.82 acres by TAG Investments by warranty deed to James Grettum. As Mr. Grettum is a CPA the Court can only conclude that his expertise led him to some conclusion different than the Court. But for purposes of this discussion the tax position of TAG Investments is of no consequence, TAG Investments having failed to provide adequate direction to E.W. Wylie as to what steps they needed to take to protect TAG Investments tax position. Whatever, the ultimate result of this quagmire, it is not a problem of E.W. Wylie's making and it does not constitute a complete failure of consideration.

Under the circumstances present in this case, the Defendants' claim that Section 1031 of the Internal Revenue Code somehow renders the option void because of a complete failure of consideration is misplaced.

IV. Conclusion

The Plaintiff is entitled to judgment on their claim for specific performance as a matter of law, thus the Plaintiff's Motion for Summary Judgment is GRANTED. The Defendants' 12(b) Motion to Dismiss is DENIED.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment on their claim for specific performance is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that the Plaintiff will prepare a judgment consistent with this Memorandum Opinion and that the judgment prepared will require the Defendants to specifically perform under the terms of the Option to Purchase dated October 14, 1996.

IT IS FURTHER ORDERED that the Plaintiffs are awarded their fees, costs and disbursements as allowable by law.

Dated this 27th day of October, 1999.

/s/ Ralph R. Erickson
Ralph R. Erickson
Judge of the District Court
East Central Judicial District

Supreme Court of North Dakota

OFFICE OF THE CLERK
600 E BOULEVARD AVE DEPT 180
BISMARCK ND 58505-0530
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CLERK OF THE SUPREME COURT
PENNY MILLER

CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

June 5, 2002

Mr. Jonathan T. Garaas
Attorney at Law
Garaas Law Firm
DeMores Office Park
1314 23rd Street South
Fargo, ND 58103-3796

RE: Matrix Properties v. TAG Investments
Supreme Court No. 20010228

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,

/s/ Penny Miller
Penny Miller
Clerk
North Dakota Supreme Court

PM:ml

pc: Mr. Sidney J. Spaeth
The Honorable Georgia Dawson

Supreme Court of North Dakota

OFFICE OF THE CLERK
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CLERK OF THE SUPREME COURT
PENNY MILLER

CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

July 15, 2002

Mr. Jonathan T. Garaas
Attorney at Law
DeMores Office Park
1314 23rd St. S.
Fargo, ND 58103-3796

RE: Matrix Properties Corporation v.
JCG Investments, L.L.C, et al.
Supreme Court No. 20020011
Cass Co. No. 01-C-01052

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,

/s/ Penny Miller
Penny Miller
Clerk
North Dakota Supreme Court

PM:ml

pc: Mr. Sidney J. Spaeth
The Honorable Cynthia Rothe-Seeger

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF CASS	EAST CENTRAL JUDICIAL DISTRICT

E.W. Wylie Corporation, a Minnesota corporation,	Civil No. CV-99-02045
Plaintiffs,	**JUDGMENT**
vs.	(Filed Nov. 2, 1999)
TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,	
Defendants.	

In accordance with the Court's Memorandum Opinion on Plaintiff's Motion for Summary Judgment & Defendants 12(b) Motion for Dismissal, Order, and Order for Judgment dated October 27, 1999, granting summary judgment to Plaintiff E.W. Wylie Corporation, it is

ORDERED, ADJUDGED, AND DECREED that:

1) Plaintiff's Motion for Summary Judgment on their claim for specific performance is GRANTED;

2) Defendants' Motion to Dismiss is DENIED;

3) Defendants' are ordered to specifically perform under the Option To Purchase dated October 14, 1996.

4) Plaintiff is awarded its fees, costs and disbursements in the sum of $90.

WITNESS, The Honorable Ralph R. Erickson, and my hand and seal this 2d day of November, 1999.

/s/ Dorothy Howard
Dorothy Howard
Clerk of Cass County District Court
By: /s/ Linda Brook, Deputy

North Dakota Statutes:

28-26-01.Attorney's fees by agreement – Exceptions – Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.

2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

28-05-07.Lis pendens – Effect.

In a civil action in a district court affecting the title to real property, the plaintiff, at the time of filing the complaint or at any time afterwards, or the defendant, when the defendant sets up in the defendant's answer an affirmative claim for relief affecting the title to real property and demands substantive relief, at the time of filing the defendant's answer or at any time afterwards, may file for record with the recorder of each county in which the real

property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property affected. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded is deemed a subsequent purchaser or encumbrancer with notice and is bound by all proceedings taken after the filing of such notice to the same extent as if that person were a party to the action. For the purpose of this section an action is deemed to be pending from the time of filing such notice, but such notice is of no avail unless it is followed by the first publication of the summons, or by the personal service thereof on a defendant, within sixty days after such filing

---

28-20-11. How judgment entered – Notice when entered.

The judgment must specify clearly the relief granted or other determination of the action. An entry of the judgment must be made by the clerk in the register of civil actions. The entry of any judgment affecting the title or possession of real property, except judgments required to be docketed under the provisions of section 28-20-13, is not notice of its contents or constructive notice of such judgment to a subsequent bona fide purchaser or encumbrancer in good faith, and for a valuable consideration, until a certified copy of such judgment is recorded in the office of the recorder in the county in which such property is located.

28-20-34. Interest rate on judgments.

Interest is payable on judgments recovered in the courts of this state at the same rate as is provided in the original instrument upon which the action resulting in the judgment is based, which rate may not exceed the maximum rate provided in section 47-14-09. If such original instrument contains no provision as to an interest rate, or if the action resulting in the judgment was not based upon an instrument, interest is payable at the rate of twelve percent per annum and may not be compounded in any manner or form. Interest on all judgments recovered in the courts of this state before July 1, 1981, must remain at the rate per annum which was legally prescribed at the time the judgments were entered, and such interest may not be compounded in any manner or form.

32-03-21. Damages for wrongful occupation of realty.

The detriment caused by the wrongful occupation of real property in cases not embraced in sections 32-03-22, 32-03-27, 32-03-28, and 32-03-29 is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages and the costs, if any, of recovering the possession.

41-03-36. (3-310) Effect of instrument on obligation for which taken.

1. Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an

obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an endorser of the instrument.

2. Unless otherwise agreed and except as provided in subsection 1, if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken.

   a. In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

   b. In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

   c. Except as provided in subdivision d, if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

d. If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

3. If an instrument other than one described in subsection 1 or 2 is taken for an obligation, the effect is that stated in subsection 1 if the instrument is one on which a bank is liable as maker or acceptor or that stated in subsection 2 in any other case.

47-14-05. Legal rate of interest – Interest after maturity.

Interest for any legal indebtedness must be at the rate of six percent per annum unless a different rate not to exceed the rate specified in section 47-14-09 is contracted for in writing. All contracts must bear the same rate of interest after maturity as they bear before maturity, and any contract attempting to make the rate of interest higher after maturity is void as to the increase of interest, except for a charge for late payment penalty charged in addition to interest which may not exceed fifteen dollars or fifteen percent of the late payment, whichever

is less, unless otherwise agreed to in any commercial, agricultural, or real estate note or mortgage.

North Dakota Rules of Civil Procedure:

RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation. Service by facsimile transmission must be completed by 5:00 p.m., receiver's time, on a weekday, which is not a legal holiday, or service is considered made on the following weekday which is not a legal holiday

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request for enlargement is made before expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under **Rules 4(e) (7), 52(b), 59(c), (i) and (j),** and **60(b)**, except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any

proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending.

(d) For Motions – Affidavits. A written motion, other than one which may be heard ex parte, and notice of the motion must be served at least 18 days before the motion may be heard, unless a different period is fixed by rule or court order. A party may apply ex parte for the court to hear a motion sooner than 18 days after service of the motion.

(e) Additional Time After Service by Mail or Commercial Carrier. Whenever a party has the right or is required to do an act within a prescribed period after service of a notice or other paper and the notice or paper is served by mail or third-party commercial carrier, 3 days must be added to the prescribed period. Service by facsimile transmission is not service by mail or third-party commercial carrier for purposes of this rule.

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, must be signed by the party. Each paper must contain the signer's address and telephone number, if any. If the person signing the paper is an attorney, the paper must also contain the attorney's

State Board of Law Examiners identification number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper must be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions

stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule must be made separately from other motions or requests and must describe the specific conduct alleged to violate subdivision (b). The motion, brief, and any other supporting papers, must be served as provided in Rule 5, but must not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. The respondent shall have 10 days after a motion for sanctions is filed to serve and file an answer brief and other supporting papers. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party

to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under ***Rules 12*** or ***56*** or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. On motion served and filed no later than 15 days after notice of entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment. The motion may accompany a motion for a new trial under ***Rule 59***. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not the party raising the question in the district court objected to the findings, moved to amend them, or moved for partial findings.

(c) Judgment on partial findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim, or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

RULE 54. JUDGMENT - COSTS

(a) Definition - Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment may not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. If more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or if multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of that determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties does not terminate the action as to any of the

claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default may not be different in kind from or exceed the amount prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment must grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in the pleadings.

(d) Death Before Judgment. If a party dies after a verdict or decision upon any issue of fact and before judgment, the court nevertheless may render judgment thereon. That judgment is not a lien on the real property of the deceased party, but is payable as provided in Chapter 30.1 19, N.D.C.C.

(e) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Costs and disbursements must be allowed as provided by statute. A party awarded costs and disbursements shall submit to the clerk a detailed, verified statement thereof. Upon receipt of the statement, the clerk shall allow those costs and disbursements and insert them in the judgment. A copy of the statement must accompany the notice of entry of judgment. Objections must be served and filed with the clerk, either within 7 days after notice of entry of judgment or within such longer time the court may fix by order made within the 7 days. Objections must specify the ground thereof. If objections are filed, the clerk

shall promptly submit them to the judge who ordered the judgment. The court by ex parte order shall fix a time for hearing the objections. Unless otherwise directed by the court, the parties may waive the right to hearing and submit written argument in lieu thereof within a time specified by the court.

(2) Attorneys' Fees. A claim for attorneys' fees and related nontaxable expenses not determined by the judgment must be made by motion. The motion must be served and filed not later than 15 days after notice of entry of judgment. The trial court may decide the motion even after an appeal is filed.

RULE 59. NEW TRIALS – AMENDMENT OF JUDGMENTS

(a) New Trial – Defined. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court or by a referee.

(b) Causes for New Trial. The former verdict or other decision may be vacated and a new trial granted on the application of a party aggrieved for any of the following causes materially affecting the substantial rights of the party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury, and whenever any juror has been induced to assent to any general or special verdict or to a finding on any question

submitted to the jurors by the court by a resort to the determination of chance, the misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive damages appearing to have been given under the influence of passion or prejudice, but when a new trial is asked for on this ground and it appears that the passion and prejudice affected only the amount of damages allowed and did not influence the findings of the jury on other issues in the case, the trial court, on hearing the motion, and the supreme court, on appeal, may order a reduction of the verdict in lieu of a new trial or order that a new trial be had unless the party in whose favor the verdict was given remits the excess of damages;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Errors in law occurring at the trial and, when required, excepted to by the party making the application; or

8. If without fault or negligence on the part of the party aggrieved, such party is unable to obtain or secure a correct and complete transcript of the testimony and instructions given and proceedings had at the trial.

(c) Time for Motion for New Trial. Any motion for a new trial must be served and filed no later than the following time after notice of entry of judgment:

1. Upon the ground of newly discovered evidence, within 6 months; and

2. Upon any other ground, within 60 days, unless the court, for good cause shown, extends the time.

(d) Upon What Motion for New Trial Made. A motion for a new trial May be made upon the files, exhibits, and minutes of the court. Pertinent facts not a part of the minutes may be shown by affidavit. Either party may procure a complete or partial transcript of the proceedings for use upon the hearing of the motion.

(e) [RESERVED FOR FUTURE USE].

(f) Memorandum of Decision on Motion for New Trial. With all orders granting or refusing a new trial, the judge shall file a written memorandum concisely stating the different grounds on which the ruling is based, and unless the insufficiency or unsatisfactory nature of the evidence is expressly stated in the memorandum as a reason for granting the new trial, it must be presumed, on appeal, that it was not on that ground.

(g) Verdict Vacated by Court. The verdict of a jury also may be vacated and a new trial granted by the court in which the action is pending on its own motion without the application of either of the parties, when there has been such plain disregard by the jury of the instructions of the court or of the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of

the instructions or under the influence of passion or prejudice.

(h) Upon Trial to the Court. In granting a new trial in an action tried without a jury the court, without vacating the judgment if one has been entered, may limit the trial to one or more issues or to the taking of additional testimony on one or more issues and shall confirm or amend the findings of fact and conclusions of law or make new findings and conclusions. If a judgment has been entered, the court may vacate it and enter a new judgment or may amend it to conform to the findings of fact and conclusions of law finally made by the court.

(i) On Court's Initiative; Notice; Specifying Grounds. No later than 15 days after notice of entry of judgment, the court may order a new trial for any reason that would justify granting a new trial on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(j) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment must be served and filed no later than 15 days after notice of entry of the judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the records and errors therein arising from oversights or omission may be corrected by

the court: (1) at any time on its own initiative; or (2) on the motion of any party. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court, and thereafter while the appeal is pending may be so corrected with leave of the supreme court.

(b) Mistakes – Inadvertence – Excusable Neglect – Newly Discovered Evidence – Fraud – Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment or order in any action or proceeding for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under ***Rule 59(b)***; (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (vi) any other reason justifying relief from the operation of the judgment. The motion must be made within a reasonable time, and for reasons (i), (ii), and (iii) not more than one year after notice that the judgment or order was entered in the action or proceeding if the opposing party appeared, but not more than one year after a judgment by default has been entered. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from any appellate court except while an appeal from the judgment is actually pending before that court. This rule does not limit the power of a court to

entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in ***Rule 4(e)(7)***, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment must be by motion as prescribed in these rules or by an independent action.

RULE 70. JUDGMENT FOR SPECIFIC ACTS - VESTING TITLE

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in

whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

IN THE DISTRICT COURT OF CASS COUNTY,
NORTH DAKOTA

E.W. Wylie Corporation, a Minnesota Corporation, now called Matrix Properties Corporation,

Plaintiff,

vs.

TAG Investments, a North Dakota Partnership, James A. Grettum, individually, an Individual Resident of North Dakota,

Defendants.

Civil No.: CV-99-02045

DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AN ORDER DECLARING THAT PLAINTIFF OWES NO 2000 OPTION MONEY

Defendants, TAG Investments and James A. Grettum, respond to Plaintiff's Notice of Motion and Motion for an Order Declaring that Plaintiff Owes No 2000 Option Money dated June 13, 2000.

Point 1. The Court Does Not Have Jurisdiction To Give Matrix Properties Corporation, a Minnesota Corporation, any Relief.

Attached Hereto and Incorporated by Reference Is a Copy of the Supreme Court of North Dakota's Decision Stemming from an Appeal in the above Judgment. The Supreme Court of North Dakota did not remand this case to the District Court of Cass County for any other purpose than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the Decision of this Court's judgment ordering Defendants to specifically perform under the Option Contract dated October 14,

1996. In other words, the Supreme Court ordered that this Court's judgment was in the nature of a declaratory judgment declaring that the subject option and purchase

* * *

Point 2. The Lower Court ruling is a final Judgment That Cannot be Amended Without Compliance with Rule 52, 59 or 60 of the North Dakota Rules of Civil Procedure.

Once the Supreme Court of North Dakota has affirmed a court's judgment, there is a final judgment with its finality relating to the date of the original entry. *Geier v. Tjaden*, 84 N.W.2d 582, 583 (N.D. 1957). The judgment entered, in this case, did not litigate all issues between the parties in reference to the subject contract. The litigation between the parties was limited to the effect of the June 1, 1999, date. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court. This Court does not have jurisdiction to amend the final judgment, entered herein, unless the Plaintiff can fit within one of the grounds for amending the judgment set forth in the North Dakota Rules of Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

In the instant case, this court could not render judgment on matters that occur subsequent to November 2, 1999, and it did not attempt to do so. As of November 2, 1999, this court could not order TAG Investments to close because the facts were not present before it to establish that such an Order would be appropriate. Ordering TAG Investments to now close cannot to be done by motion. There is no Rule of Civil Procedure that would apply to Plaintiff's instant motion. **Because Matrix Properties Corporation did not seek a stay**, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment. Rule 59 similarly has a fifteen days' requirement for a request for a new trial or amendment to judgment, and such time has passed. Defendants' Motion does not set forth any of the grounds found in Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 would require the vacation of said Order after relief from such judgment. Since the judgment only relates to the effect of not closing prior to June 1, 1999, such use of Rule 60 would be inappropriate.

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota in its judgment. As stated by *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141 (Iowa 1999) at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.,* 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce

> the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

Franzen v. Deere And Company, 409 N.W.2d 672, 674 (Iowa 1987). The District Court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the District Court does not have authority to revisit issues already concluded by that judgment nor decide different issues that stem from subsequent actual matters. It is respectfully submitted that the District Court does not have jurisdiction, in this case, to expand upon the final judgment modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure. The contract issues after November 2, 1999, were truly not before this Court and should not be before this Court Plaintiff's instant motion. If Plaintiff feels aggrieved by the present factual scenario, a declaratory action determining the rights of the parties as it now exists, is the only remedy Plaintiff has.

Point 3. The North Dakota Rules of Civil Procedure have not been followed by the Plaintiff and this court has no authority to proceed in the instant motion.

A. Plaintiff has failed to afford Defendants with sufficient time to address this Motion. Pursuant to Rule 6(d) of the North Dakota Rules of Civil Procedure,

> "A written Motion, other than one which may be heard ex parte, and notice of the motion must be served at least 14 days before the motion may be heard, unless a different period is fixed by these

> rules or by order of the court. Such an order may for cause shown be made on ex parte application."

There is no order setting a different period of time, nor has there been an ex parte application. The answering Defendants have no knowledge of an ex parte application or ex parte order setting forth a different time for the required notice. There is nothing in the Rules that would allow Plaintiff to bring a motion requesting a shortened time for noticing the hearing and the hearing on the motion before the court at the same time. The failure to have an order shortening the time for notice means that the time limits of Rule 6(d) should apply. The length of the notice afforded Defendants is particularly egregious in light of the massive flooding occurring in Fargo, North Dakota, on June 20, 2000. As noted by the Affidavit of James A. Grettum, James A. Grettum's office and his attorneys' offices, as well as his attorneys' homes were flooded. Precious time to properly respond to Plaintiff's Motion has been lost. Shortened notice exasperates Defendants' situation.

Point 4. Plaintiff's instant Motion is an action seeking a declaratory judgment without compliance with the Rules.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32 shall be in accordance with these rules and the right to trial by jury may be demanded under the circumstances of the matter provided in Rules 38 and 39. Under Chapter 32-23, the Rules would require a Summons and Complaint to have Plaintiffs obtain a declaratory judgment. Both a service of a Summons under

Rule 3, a Complaint setting forth in its title to relief under Rule 7 and the allowance of Defendants' right to answer under Rule 8 of North Dakota Rules of Civil Procedure would allow this discovery on the part of the Defendants under several Rules, and potentially a jury trial on factual issues. Plaintiff does not want to allow Defendants to have their due process rights. This Court has no authority to short circuit the process because of a judgment that may involve this contract but did not determine all rights relating to such contract. There may be a course of action open to Plaintiff if it feels aggrieved by the factual situation but a motion in the instant case is not the procedure that it can follow.

* * *

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF CASS	EAST CENTRAL JUDICIAL DISTRICT
Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	Civil No. 99-02045 MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

- BEFORE THE HONORABLE FRANK L. RACEK
– DISTRICT JUDGE –

Cass County Courthouse
Fargo, North Dakota 58103
June 22, 2000

APPEARANCES

FOR THE PLAINTIFF:
Mr. Sidney J. Spaeth
Attorney at Law
502 First Avenue North
Fargo, North Dakota 58107-1389

FOR THE DEFENDANT:
Mr. Jonathan T. Garaas
Attorney at Law
1314 23rd Avenue South
Fargo, North Dakota 58103

* * *

[3] THE COURT: So now what's in dispute here? There's supposed to be a payment made in the year 2,000?

MR. GARAAS: No, there's another option – the effect of it was, Your Honor, that the Supreme Court has said that the 20 acres that was purchased on June 28, 1999, met the June 1, 1999, deadline. They gave a notice of exercise on July 1, 1999, that they have never carried through with until December when they made a counter-proposal, and the most recent Supreme Court decision would in fact stand for a very substantial recognition that this option to purchase – notice that [4] they are relying upon of July 1, 1999, has been rejected by noncompliance and also by deviation from the terms of the option to purchase. We have no – no obligation to proceed because they've never acted to proceed and that's true since July 1.

On July 1, 1999, there was a 45-day closing requirement imposed upon them that they didn't even come close to meeting. That would have been to August 16th by my count if I gave them credit for the Sunday which was the 15th which would be the 45 days. On November 2, 1999, the District Court, contrary to the Plaintiff's position, said that we have to honor the terms of the option to purchase, and we have always honored the option to purchase terms. The Plaintiff has repudiated them, gave a counterproposal and never closed. In fact, on June 28th Mr. Bueide, their attorney, told us that when he threatened us with a

hellacious lawsuit he hadn't even read the option to purchase prior to threatening us with a lawsuit.

On the 45 days that was supposed to accomplish the closing the burden was upon them not us because we don't have to give them good title. They have to pay us. There are a number of things that are open to them depending on what they find, and when they find it they have to give us an option or give us some – identify [5] what their next step is so that we then have some certain things that we can do including saying, Take a hike, buddy, because we're not gonna do anything. You ought to pay us if you want what amounts to is a – is a deed for whatever interest in the property we have and we may not have anything. Because at the time of the option to purchase we didn't have any interest in the property. We only had the possibility of acquiring an interest in the property and they knew that. And if we didn't have title they could take a hike. They could walk away. Their attorney at the Supreme Court arguments recognized they could walk away.

Your Honor, what the Court is being asked to do on nine days notice – and that's contrary to the North Dakota Rules of Evidence. I'm not aware of any order that's shortening up. You can see how devastating we are – or we have been from a professional and a personal standpoint, and then be hit with nine days notice for something which is seeking to amend a final judgment which they never appealed from at a time when they're in default. This blows my mind. I do not understand the Plaintiff. How they think that when they're in default that they have any contractual rights. Because if they do they're operating under a different series of law than I am. I'm operating and my client has always been [6] operating on the basis of an option to purchase which we promised to honor, and

they have misrepresented it and told this Court an absolute falsehood. You saw the transcript of what I said. I never said that we would transfer the property if the Supreme Court ruled against us. I have always said that we will honor the option to purchase.

My clients honor their word, but they will not accept one single counterproposal and that's what the Plaintiff is trying to do is give counterproposals and shove them down our throats. And we will not accept any deviation from the terms of the option to purchase and we will not accept any deviation from due process of law which says 14 days notice for a motion. And I can't conceive of a motion that can arise out of a final judgment that they didn't appeal from. I can't conceive of due process of law under the Rules of Civil Procedure that provide for 20 days notice for proceedings which are dependent upon new facts that were never even in existence at the time of the Judge's memorandum opinion much less on November 2nd when he – when the final order and judgment came down.

And for this Court to now being asked to intercept, give an advisory opinion when it doesn't have jurisdiction in the first place blows my legal mind. And [7] I just can't understand how they can expect this Court to have the right to act much less an understanding that was going on. If they think that they have a lawsuit, they should bring it. If they think that they have an option to purchase that is capable of being exercised, they better honor it.

But the facts are on June 2nd, the year 2,000, they had not accomplished the purchase and thats past tense because the contract now provides for past tense purchased later on deeded on June 1, 19 – of the year 2,000. In fact, they hadn't even tried to – to act prior to that time

except through what amounts to is contacts through attorneys which aren't included in the option to purchase in any way, shape or form. And the order is for us to appear at closing which they then unilaterally ordered to close and then unilateral cancellations on two different occasions in May and – and June. The exact dates, excuse me, escape me, Your Honor, and that's partly because I haven't had actually time to prepare for this. I came right off the tractor. I've been fighting sewage.

THE COURT: Okay. Mr. Spaeth.

* * *

IN THE DISTRICT COURT FOR CASS COUNTY, NORTH DAKOTA

Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, a Minnesota Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	CIVIL NO.:CV-99-02045 **BRIEF IN RESISTANCE TO PLAINTIFF'S MOTION FOR ORDER COMPELLING DEFENDANTS TO PROVIDE DEEDS TO PLAINTIFF, OR, ALTERNATIVELY, DECLARING THE JUDICIAL TRANSFER OF THE PROPERTY TO PLAINTIFF**

For their response to Plaintiff's Motion, Defendants submit the following:

INTRODUCTION

Matrix Properties Corporation's introduction failed to accurately state the record and the facts. On Page 1, Matrix Properties Corporation states:

> "This Court, as affirmed by the North Dakota Supreme Court, has ordered the specific performance of the sale of real property in Cass County North Dakota pursuant to the terms of a 1996 Option Agreement between plaintiff and defendants TAG Investments and James A. Grettum, and certain other parties affiliated with TAG and Grettum (the "Agreement").

First, this Court has **never** issued an order requiring *the specific performance of the sale of real property*. This Court has ordered the Defendants [no "other parties affiliated with TAG and Grettum" were ordered, nor were they involved in said litigation] as follows:

* * *

POINT 2. THE LOWER COURT DID NOT HAVE JURISDICTION TO GIVE MATRIX PROPERTIES CORPORATION, A MINNESOTA CORPORATION, ANY RELIEF.

The Supreme Court of North Dakota, in *Matrix Properties Corporation v. TAG Investments*, 2000 ND 88, 609 NW 2d 737, did not remand this case to the District Court of Cass County for any purpose other than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the Cass County District Court's decision[1] resulting in a November 2, 1999, Judgment[2] ordering Defendants ". . . to specifically perform under the Option To Purchase dated October 14, 1996." In other words, the prior proceedings before the Supreme Court of North Dakota, and earlier before the lower court, were in the nature of a declaratory judgment declaring that the subject Option to Purchase was not terminated by its own terms because of the failure of Matrix Properties Corporation to close on twenty acres on or before June 1, 1999.

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[1] **Addendum #1.**

[2] **Addendum #2.**

The relief given to Matrix Properties Corporation, by the former judgment, and subsequent appeal, was a declaratory judgment consistent with North Dakota Century Code §32-04-02, paragraph 3. The Judgment of November 2, 1999, did not contain an order compelling Defendants to close because the facts before the trial court at the time of the summary judgment (as illustrated by the recitation of facts in the Supreme Court's Decision and the District Court's Memorandum Opinion) did not establish Matrix Properties Corporation's right to have a closing compelled by the lower court as of the date of the Judgment. Indeed, when Matrix Properties Corporation first submitted its proposed Judgment to the District Court, it sought an order which would have compelled a ". . . closing on the sale of the Property subject to Plaintiff's option exercises dated July 1, 1999 and July 2, 1999" involving a deed from TAG Investments.[3] Matrix Properties Corporation's initial proposed judgment was rejected by the District Court[4] because the first proposed Judgment exceeded the lower court's order for judgment – the factual circumstances as of November 2, 1999, would not support that form of judgment.

TAG Investments appealed the November 2, 1999, Judgment of the District Court, **BUT DID NOT SEEK A STAY**. More importantly, **MATRIX PROPERTIES CORPORATION DID NOT SEEK A STAY** from the effect of said November 2, 1999, Judgment.

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[3] Addendum #3 [the Memorandum Opinion referenced in the letter is set forth as Addendum #1, and is not herein duplicated].

[4] Addendum #4.

As will be more fully discussed in Point 3 of this Brief, a lower court's jurisdiction terminates as to both subject matter and parties upon an affirmance, without remand, of a judgment by an appellate court. See *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141, 142 (Iowa 1999).

POINT 3. THE JUDGMENT OF NOVEMBER 2, 1999, IS A FINAL JUDGMENT THAT CANNOT BE AMENDED WITHOUT COMPLIANCE WITH RULE 52, 59 AND/OR 60 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

Once the Supreme Court of North Dakota has affirmed a lower court's judgment, there is a final judgment – with its finality relating to the date of the original entry. *Geier v. Tjaden*, 84 N.W.2d 582, 583 (N.D. 1957). The judgment entered, in this case, did not litigate all issues between the parties in reference to the subject contract [Option to Purchase]. The litigation between the parties was limited to the effect of certain actions taken as of the June 1, 1999, date established by the Option to Purchase. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court.[5]

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[5] However, this court has determined, *and Matrix Properties Corporation did not appeal from such decision*, that the Option to Purchase requires "... the closing (the time at which the money is exchanged for the deed) must occur within 45 days following exercise of the option (and up to 125 days if a title problem[ ] needs to be resolved)." Addendum #1, page 12. The lower court later notes the timetable for closing, "... the terms of the Option to Purchase which allowed 45 days to close the deal from the date of the exercise of the

(Continued on following page)

This District Court does not have jurisdiction to amend the final judgment of November 2, 1999, unless there is a ground for amending the judgment found within the North Dakota Rules of Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for

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option." Addendum #1, pages 12-13. The lower court then nails the conclusive effect of a provision within the Option to Purchase:

> "It can not be disputed in this case that time is of the essence, as the Option to Purchase specifically provides that it is. Paragraph 21 of the Option to Purchase provides:
>
> 21. **TIME OF THE ESSENCE:** The parties expressly agree that time shall be of the essence in the performance of the parties under this agreement."

This court reiterated its position, *never appealed from by Matrix Properties Corporation*, (a) "(i)n this case the option agreement sets forth a clear timeline of the contemplated performance." [page 13]; (b) "It appears to the Court that these were the matters for which time was of the essence . . ." [page 14]; (c) "The Option to Purchase clearly states that closing could occur at any time up to 45 days after the exercise of the option . . ." [page 14]; (d) "The optioners made an offer wherein they agreed that the optionees would have forty-five days from the date of exercise of the option to close the transaction." [page 14]; (e) "Having exercised the option, they (E.W. Wylie) were required to close the purchase within 45 days. They closed within 34 days, well within the time allowed for performance" [page 16]; (f) "The executory contract included a term that the transaction must close within 45 days." [page 16]. Pages reference Addendum #1, and the quoted language is not intended to identify all of this court's references to the 45 day closing requirement.

> amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

In the instant case, the lower court **could not** render judgment on matters that occur *subsequent* to November 2, 1999 [to do so involves a legal and factual impossibility]. As of November 2, 1999, the lower court could not order TAG Investments to close because the facts were not present before it to establish that such an Order would be appropriate.

Ordering TAG Investments to now close cannot be done by motion. Similarly, determining [as the Order of June 26, 1999, so determines], that there is a binding executory contract between the parties because of disputed facts that occurred *subsequent* to the November 2, 1999, Judgment is beyond the lower court's jurisdiction.

There is no North Dakota Rule of Civil Procedure that would apply to Matrix Properties Corporation's subject motion, nor has Plaintiff made any attempt to identify its legal basis for such an order. There is no rule of procedure that would allow the District Court to issue declaratory orders affecting substantive rights on contractual matters that are based on facts that occur subsequent to the date of the judgment.

Because Matrix Properties Corporation did not seek a stay, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment. Rule 59 of the North Dakota Rules of Civil Procedure has a similar fifteen days' requirement for a request for a new trial or amendment to judgment, and such time period has passed.

Matrix Properties Corporation's Motion does not set forth any of the grounds found within Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 N.D.R.Civ.P. would require the vacation of the judgment or relief from the judgment. Since the Judgment, upon affirmance by the Supreme Court of North Dakota, only relates to the effect of not closing prior to June 1, 1999, Rule 60 N.D.R.Civ.P. cannot be the basis for Matrix Properties Corporation's notion.

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota. As stated by *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141 (Iowa 1999), at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.,* 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

In *Franzen v. Deere And Company*, 409 N.W.2d 672, 674 (Iowa 1987), it is noted that ". . . the district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, (but) the district court does not have authority to revisit and decide differently issues already concluded by that judgment." It is respectfully submitted that the Cass County District

Court does not have jurisdiction to expand upon the final judgment or modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure. The contract issues arising out of the Option to Purchase occurring after November 2, 1999, are truly not part of the prior litigation, and should not be passed upon by the lower court by means of a post-judgment motion.

If Matrix Properties Corporation feels aggrieved by the present factual scenario, a declaratory action determining the rights of the parties, as they now exist, is the appropriate remedy – not a post-judgment motion that is not authorized by the North Dakota Rules of Civil Procedure that acts as an amendment to a final judgment.

POINT 4. MATRIX PROPERTIES CORPORATION'S MOTION IS AN ACTION SEEKING A DECLARATORY JUDGMENT WITHOUT COMPLIANCE WITH APPROPRIATE RULES OR STATUTES.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32-23 of the North Dakota Century Code shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances of the matter provided in Rules 38 and 39. Under Chapter 32-23 of the North Dakota Century Code and the civil procedure rules, a Summons and Complaint is required before a lower court may provide declaratory judgment. A service of a Summons under Rule 3 N.D.R.Civ.P., a Complaint showing entitlement to relief under Rule 7 N.D.R.Civ.P., the allowance of the defendants' right to answer under Rule 8 N.D.R.Civ.P., discovery on the part of the defendants under several different rules of procedure,

and the potential right to a jury trial on factual issues are all necessary matters inherent in the judicial system heretofore created to provide Defendants with due process of law. The lower court's Order of June 26, 2000, was issued without compliance with the due rights of the Defendants as expressed in the North Dakota Rules of Civil Procedure.

The District Court does not have the authority to short-circuit the process. While the former judgment may involve the same option contract [Option to Purchase], it did not determine all rights relating to said Option to Purchase. There may be a course of action open to Matrix Properties Corporation if it feels aggrieved by the factual situation presented after November 2, 1999 [or even after it started its original Complaint for Specific Performance on July 9, 1999], but its motion prompting these proceedings, and the resulting declaratory Order were totally without statutory or procedural basis, and contrary to the due process rights of Defendants – as well as those individuals or entities that are not presently even parties to the litigation.

* * *

IN THE DISTRICT COURT OF CASS COUNTY,
NORTH DAKOTA

Matrix Properties Corporation, formerly known as E. W. Wylie Corporation, a Minnesota Corporation,

Plaintiff,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

CIVIL NO.: CV-99-02045

BRIEF OF DEFENDANTS IN RESISTANCE TO PLAINTIFF'S MOTION FOR AN ORDER COMPELLING DEFENDANTS TO PROVIDE DEEDS TO PLAINTIFF, OR, ALTERNATIVELY, DECLARING THE JUDICIAL TRANSFER OF THE PROPERTY TO PLAINTIFF

For their response to Plaintiff's Motion, Defendants submit the following:

INTRODUCTION

Matrix Properties Corporation brings a Motion to amend a Judgment on for hearing while the case is on appeal. Matrix Properties Corporation does not seek to enforce the Judgment, which Judgment requires Defendants to specifically perform under the Option to Purchase. Rather, Matrix Properties Corporation requests this Court amend the Judgment. Such request to amend while the case is on appeal, is made without any reliance upon any civil rule and without any factual presentation made by Matrix Properties Corporation. It is also made upon too little notice pursuant to the Rules of Civil Procedure.

* * *

LAW AND ARGUMENT

I. Judicial and Procedural Issues

POINT 1. THE COURTS DOES NOT HAVE JURISDICTION TO DO WHAT E.W. WYLIE CORPORATION, A MINNESOTA CORPORATION, DEMANDS.

There has been an appeal filed and upon the filing of the notice of appeal the trial court is stripped of jurisdiction to amend or interpret the Judgment. *Buzzell v. Libi*, 340 N.W.2d 36 (N.D. 1983); *Schmidt v. Schmidt*, 325 N.W.2d 230 (N.D. 1982); *Harwood v. Harwood,* 283 N.W.2d 144 (N.D. 1979); *Orwick v. Orwick*, 152 N.W.2d 95 (N.D. 1967); *Bryan v. Miller*, 16 N.W.2d 275, 73 N.D. 487 (N.D. 1944).

The Court's Judgment required only the Defendants to " . . . specifically perform under the Option to Purchase dated October 14, 1996." The Court's Order and resulting Judgment did not direct a deed nor a conveyance. Thus the Judgment of the Court is in the nature of a declaratory action stating that the Option to Purchase dated October 14, 1996 was not terminated by its own terms because of the non-purchase by the Plaintiff of 20 acres on or before June 1, 1999. Nothing within the Judgment required a deed to Matrix Properties Corporation, a Minnesota Corporation. The facts and circumstances set forth at the time the Judgment was entered did not require a deed. Whether facts and circumstances *subsequent* to the November 2, 1999, Judgment would result in a deed to Matrix Properties Corporation are matters that cannot be ruled upon by this Court while it is on appeal [among other reasons].

POINT 2. THE LOWER COURT DID NOT HAVE JURISDICTION TO GIVE MATRIX PROPERTIES CORPORATION, A MINNESOTA CORPORATION, ANY RELIEF.

The Supreme Court of North Dakota, in *Matrix Properties Corporation v. TAG Investments*, 2000 ND 88, 609 NW 2d 737, did not remand this case to the District Court of Cass County for any purpose other than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the Cass County District Court's decision[7] resulting in a November 2, 1999, Judgment[8] ordering Defendants " . . . to specifically perform under the Option To Purchase dated October 14, 1996." In other words, the prior proceedings before the Supreme Court of North Dakota, and earlier before the lower court, were in the nature of a declaratory judgment declaring that the subject Option to Purchase was not terminated by its own terms because of the failure of Matrix Properties Corporation to close on twenty acres on or before June 1, 1999.

The relief given to Matrix Properties Corporation, by the former judgment, and subsequent appeal, was a declaratory judgment consistent with North Dakota Century Code §32-04-02, paragraph 3. The Judgment of November 2, 1999, did not contain an order compelling Defendants to close because the facts before the trial court at the time of the summary judgment (as illustrated by the recitation of facts in the Supreme Court's Decision and the District Court's Memorandum Opinion) did not establish

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[7] Addendum #1.

[8] Addendum #2.

Matrix Properties Corporation's right to have a closing compelled by the lower court as of the date of the Judgment. Indeed, when Matrix Properties Corporation first submitted its proposed Judgment to the District Court it sought an order which would have compelled a " . . . closing on the sale of the Property subject to Plaintiff's option exercises dated July 1, 1999 and July 2, 1999" involving a deed from TAG Investments.[9] Matrix Properties Corporation's initial proposed judgment was rejected by the District Court[10] because the first proposed Judgment exceeded the lower court's order for judgment – the factual circumstances as of November 2, 1999, would not support that form of judgment.

TAG Investments appealed the November 2, 1999, Judgment of the District Court, **BUT DID NOT SEEK A STAY.** More importantly, **MATRIX PROPERTIES CORPORATION DID NOT SEEK A STAY** from the effect of said November 2, 1999, Judgment.

As will be more fully discussed in Point 3 of this Brief, a lower court's jurisdiction terminates as to both subject matter and parties upon an affirmance, without remand, of a judgment by an appellate court. See *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141, 142 (Iowa 1999).

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[9] Addendum #3 [the Memorandum Opinion referenced in the letter is set forth as Addendum #1, and is not herein duplicated].

[10] Addendum #4.

POINT 3. THE JUDGMENT OF NOVEMBER 2, 1999, IS A FINAL JUDGMENT THAT CANNOT BE AMENDED WITHOUT COMPLIANCE WITH RULE 52, 59 AND/OR 60 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

Once the Supreme Court of North Dakota has affirmed a lower court's judgment, there is a final judgment – with its finality relating to the date of the original entry. *Geier v. Tjaden*, 84 N.W.2d 582, 583 (N.D. 1957). The judgment entered, in this case, did not litigate all issues between the parties in reference to the subject contract [Option to Purchase]. The litigation between the parties was limited to the effect of certain actions taken as of the June 1, 1999, date established by the Options to Purchase. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court.[11]

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[11] However, this court has determined, *and Matrix Properties Corporation did not appeal from such decision*, that the Option to Purchase requires " . . . the closing (the time at which the money is exchanged for the deed) must occur within 45 days following exercise of the option (and up to 125 days if a title problem[ ] needs to be resolved)." Addendum #1, page 12. The lower court later notes the timetable for closing, " . . . the terms of the Option to Purchase which allowed 45 days to close the deal from the date of the exercise of the option." Addendum #1, pages 12-13. The lower court then nails the conclusive effect of a provision within the Option to Purchase:

> "It can not be disputed in this case that time is of the essence, as the Option to Purchase specifically provides that it is. Paragraph 21 of the Option to Purchase provides:
>
> > 21. TIME OF THE ESSENCE: The parties expressly agree that time shall be of the essence in the performance of the parties under this agreement."

(Continued on following page)

This District Court does not have jurisdiction to amend the final judgment of November 2, 1999, unless there is a ground for amending the judgment found within the North Dakota Rules of Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

In the instant case, the lower court **could not** render judgment on matters that occur *subsequent* to November 2, 1999 [to do so involves a legal and factual impossibility].

This court reiterated its position, *never appealed from by Matrix Properties Corporation*, (a) "(i)n this case the option agreement sets forth a clear timeline of the contemplated performance." [page 13]; (b) "It appears to the Court that these were the matters for which time was of the essence . . . " [page 14]; (c) "The Option to Purchase clearly states that closing could occur at any time up to 45 days after the exercise of the option . . . " [page 14]; (d) "The optioners made an offer wherein they agreed that the optionees would have forty-five days from the date of exercise of the option to close the transaction." [page 14]; (e) "Having exercised the option, they (E.W. Wylie) were required to close the purchase within 45 days. They closed within 34 days, well within the time allowed for performance" [page 16]; (f) "The executory contract included a term that the transaction must close within 45 days." [page 16]. Pages reference Addendum #1, and the quoted language is not intended to identify all of this court's references to the 45 day closing requirement.

As of November 2, 1999, the lower court could not order TAG Investments to close because the facts were not present before it to establish that such an Order would be appropriate.

Ordering TAG Investments to now close cannot be done by motion. Similarly, determining [as the Order of June 26, 1999, so determines], that there is a binding executory contract between the parties because of disputed facts that occurred *subsequent* to the November 2, 1999, Judgment is beyond the lower court's jurisdiction.

There is no North Dakota Rule of Civil Procedure that would apply to Matrix Properties Corporation's subject motion, nor has Plaintiff made any attempt to identify its legal basis for such an order. There is no rule of procedure that would allow the District Court to issue declaratory orders affecting substantive rights on contractual matters that are based on facts that occur subsequent to the date of the judgment.

Because Matrix Properties Corporation did not seek a stay, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment. Rule 59 of the North Dakota Rules of Civil Procedure has a similar fifteen days' retirement for a request for a new trial or amendment to judgment, and such time period has passed.

Matrix Properties Corporation's Motion does not set forth any of the grounds found within Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 N.D.R.Civ.P. would require the vacation of the judgment or relief from the judgment. Since the Judgment, upon affirmance by the Supreme Court of North Dakota, only relates to the effect

of not closing prior to June 1, 1999, Rule 60 N.D.R.Civ.P. cannot be the basis for Matrix Properties Corporation's notion [sic].

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota. As stated by *Waterhouse v. Iowa District Court for Linn County*, 593 N.W.2d 141 (Iowa 1999), at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.*, 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

In *Franzen v. Deere And Company*, 409 N.W.2d 672, 674 (Iowa 1987), it is noted that " . . . the district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, (but) the district court does not have authority to revisit and decide differently issues already concluded by that judgment." It is respectfully submitted that the Cass County District Court does not have jurisdiction to expand upon the final judgment or modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure. The contract issues arising out of the Option to Purchase occurring after November 2, 1999, are truly not

part of the prior litigation, and should not be passed upon by the lower court by means of a post-judgment motion.

If Matrix Properties Corporation feels aggrieved by the present factual scenario, a declaratory action determining the rights of the parties, as they now exist, is the appropriate remedy – not a post-judgment motion that is not authorized by the North Dakota Rules of Civil Procedure that acts as an amendment to a final judgment.

POINT 4. MATRIX PROPERTIES CORPORATION'S MOTION IS AN ACTION SEEKING A DECLARATORY JUDGMENT WITHOUT COMPLIANCE WITH APPROPRIATE RULES OR STATUTES.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32-23 of the North Dakota Century Code shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances of the matter provided in Rules 38 and 39. Under Chapter 32-23 of the North Dakota Century Code and the civil procedure rules, a Summons and Complaint is required before a lower court may provide declaratory judgment. A service of a Summons under Rule 3 N.D.R.Civ.P., a Complaint showing entitlement to relief under Rule 7 N.D.R.Civ.P., the allowance of the defendants' right to answer under Rule 8 N.D.R.Civ.P., discovery on the part of the defendants under several different rules of procedure, and the potential right to a jury trial on factual issues are all necessary matters inherent in the judicial system heretofore created to provide Defendants with due process of law. The lower court's Order of June 26, 2000, was issued without compliance with the due [process] rights of

the Defendants as expressed in the North Dakota Rules of Civil Procedure.

The District Court does not have the authority to short circuit the process. While the former judgment may involve the same option contract [Option to Purchase], it did not determine all rights relating to said Option to Purchase. There may be a course of action open to Matrix Properties Corporation if it feels aggrieved by the factual situation presented after November 2, 1999 [or even after it started its original Complaint for Specific Performance on July 9, 1999], but its motion prompting these proceedings, and the resulting declaratory Order were totally without statutory or procedural basis, and contrary to the due process rights of Defendants – as well as those individuals or entities that are not presently even parties to the litigation.

POINT 5. INSTEAD OF BRINGING A POST-JUDGMENT MOTION, MATRIX PROPERTIES CORPORATION SHOULD HAVE STARTED EITHER A DECLARATORY ACTION OR AN ACTION FOR SPECIFIC PERFORMANCE FOR MATTERS THAT OCCURRED POST-JUDGMENT.

James A. Grettum and TAG Investments are entitled to a proper factual hearing as to all factual matters that occur subsequent to the November 2, 1999, Judgment to determine if Matrix Properties Corporation's actions constituted a counter offer [counter proposal]. Those matters occurring *subsequent* to the Judgment (and matters not passed upon in the former Judgment) are not controlled by said Judgment, and are not bound by the doctrine of *res judicata*. See *Nodland v. Nokota Co,* 314

N.W.2d 89 (ND 1981). In order for any issue to be considered precluded by the doctrine of *res judicata*, it is not enough that such issue was involved in an earlier action, but must have been actually litigated and decided in such action. See *Matter of Nelson's Estate*, 281 N.W.2d 245 (ND 1979) and *Dolajak v. State Auto and Casualty Underwriters*, 252 N.W.2d 180 (ND 1977). If it is not certain that the same question was determined in another action in favor of the party relying on the judgment therein as conclusive as to a point in question, the judgment is not *res judicata* on such point in question. *Knutson v. Ekren*, 5 N.W.2d 74 (ND 1942).

The Supreme Court's judgment, entered in this case on May 30, 2000, reveals the only facts determined, and acts as *res judicata* only as to those facts involving the June 1, 1999, deadline and closing of the twenty acres on June 28, 1999.

Whether Matrix Properties Corporation's notice of the exercise [of] the option in July, 1999, was consistent with the Option to Purchase has not been passed upon by any court to date, and was not part of the relief afforded Matrix Properties Corporation on November 2, 1999.

There are no facts found within the Supreme Court of North Dakota's decision (which is the decision that forms the potential basis for a *res judicata* claim) as to whether the July 1999, letters to TAG Investments and Grettum constituted a proper exercise of the option that did not result in a counter offer. Issues relating to Matrix Properties Corporation's July, 1999, notice, and its attempts, or lack of attempts, to close were not appropriate to summary judgment as of November 2, 1999. Facts relating to the July, 1999, notice were not necessary to determine the

final judgment that was entered on November 2, 1999, and affirmed by the Supreme Court of North Dakota.

The Judgment of November 2, 1999, should not in any way, shape, or form prevent Grettum and TAG Investments from having the right to a factual hearing concerning the factual issue(s) [and properly developed by discovery under the North Dakota Rules of Civil Procedure] as to whether Matrix Properties Corporation's efforts to purchase 114 acres from July 1999, through December 22, 1999, was a counteroffer because its efforts were inconsistent with the terms of the subject Option to Purchase. These later facts, some being in dispute, were not involved in the former Judgment. Also important, most of those facts arose more than 45 days following the November 2, 1999, Judgment.

If it feels it has a legal and factual basis, Matrix Properties Corporation must initiate either (a) a new action for specific performance, or (b) an action for a declaratory judgment.

The due process right of both TAG Investments and James A. Grettum would require a factual hearing on the disputed facts that were not passed upon by the former judgment, or those occurring post-judgment.

The District Court's Order of June 26, 2000, which presumes facts that were not passed upon by the prior litigation and that affect substantive rights of the parties, is inconsistent with TAG Investments' and James A. Grettum's right to due process of law.

II. Addressing Matrix Properties Corporation's Law and Argument.

As set forth in the Introduction to this Brief, TAG Investments knows that Matrix Properties Corporation has never accepted unconditionally the terms of the Option to Purchase. Matrix Properties Corporation's attempt to exercise option rights in 1999 were merely counteroffers and constituted a rejection of the Option to Purchase. Its present Brief and argument also establishes that Matrix Properties Corporation, to this date, is still trying to deny TAG Investments' certain rights expressly set forth in the Option to Purchase.

A. TAG Investments Is Only Bound By What The Option To Purchase States – Not What Matrix Properties Corporation Wants The Option To State.

The Law and Argument expressed in I(A) of Matrix Properties Corporation's Brief is but one more example of Matrix Properties Corporation putting a counteroffer on the table.

Paragraph 13 of the Option to Purchase provides that Matrix Properties Corporation would have 15 days after the exercise of the option to examine the Abstract of Title. It is noted that from July, 1999, through the end of December, 1999, and until the oral arguments before the Supreme Court, TAG Investments had believed that Wylie still had, in its possession, two Abstracts of Title previously delivered to Matrix Properties Corporation in 1996. Matrix Properties Corporation now concedes that it lost the two abstracts owned by TAG Investments and entrusted to Matrix Properties Corporation. Matrix Properties Corporation provided different abstracts of title in December of 1999. Matrix Properties Corporation did not

accept TAG Investments' title as set forth in the title opinions of Daniel Bueide, attached to the Affidavit of James A. Grettum, and demanded corrective work on the part of TAG Investments. Paragraph 13 of the Option to Purchase, though, states as follows:

> "If the abstract of title fails to disclose the title of TAG to be good and marketable or if there are easements, restrictive covenants or mineral grants and reservation of record not acceptable to Buyer as permitted encumbrances, or if there are building zoning laws, ordinances or state and/or federal regulations that would hinder Buyer's intended use of the Property, WYLIE, at WYLIE's election, may declare this option and the exercise or partial exercise thereof null and void, or WYLIE may offer TAG a reasonable time (but not more than 120 days) in which to make the title good and marketable or the concerns as to the acceptability of easements, restrictive covenants or mineral grants and reservations of record and building and zoning laws, ordinances and state and federal regulations addressed to Buyer's satisfaction. No objection can be raised, however, for matters stated to be acceptable in paragraph 19 below. **If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE either to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its exercise of this Option Agreement void as to the Individual**

> **Parcel selected or to declare the entire Option Agreement void. Any Option Money paid or amount paid for Street Assessment theretofore shall be refunded to WYLIE should WYLIE select the latter option.** (Bold supplied for emphasis.)

In December 1999, Matrix Properties Corporation did not allow TAG Investments' stated contractual right as set forth in Paragraph 13 of the Option to Purchase. Assuming a valid exercise of the Option to Purchase, TAG Investments had the right to (a) make title good and marketable or (b) decline to make title good and marketable. Matrix Properties Corporation was to either (a) accept the title in existing condition if TAG Investments did not intend to make title good and marketable or (b) declare the option void in whole or in part. Matrix Properties Corporation's present motion still does not recognize the clear words of the Option to Purchase that *TAG Investments does not need to do any corrective work.*

For obvious reasons, Matrix Properties Corporation never attempts to justify it failure to honor the 45 day time requirement for closing set forth in the Option to Purchase – a clear rejection of the terms of the Option to Purchase. TAG Investments did not accept any counteroffer, nor could it accept any counteroffer while the Option to Purchase was in effect [prior to Matrix Properties Corporation's default on February 28, 2000, or even the later possible date of June 1, 2000, when additional land was not "purchased"].

Matrix Properties Corporation further asserts that NDCC § 47-10-04 would require a warranty deed setting forth certain covenants, including the covenant of fee simple seizen [sic] free from lawful disturbance, and also

free of all encumbrances. However, reference to NDCC § 47-10-04 is inappropriate because the Option to Purchase *does not contain* a promise that TAG Investments would give the "usual covenants."[12] Matrix Properties Corporation attempt to deceive this Court is even apparent in its reference to NDCC § 47-10-04[13] by indentation and single space of certain language – implying it is a quotation of the identified statute. In fact, quotation marks are not included because Plaintiff took the referenced language out of context, and slightly changed the wording.[14] Of significance is Matrix Properties Corporation's failure to include the introductory language of NDCC § 47-10-04 ["The covenants mentioned in section 47-10-03 must be in substance as follows:"], thereby taking it out of context, and improperly suggesting every warranty deed is identical to every other warranty deed in terms of covenants. NDCC § 47-10-03 must be read in conjunction with NDCC § 47-10-04, not heedlessly as suggested by Matrix Properties Corporation. TAG Investments may be subject to the provisions of NDCC § 47-10-19. However, since certain matters may be found defective, yet still accepted, by Matrix Properties Corporation, in order to properly interpret Section 13 of the Option to Purchase, any warranty deed issued by TAG Investments

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[12] **"47-10-03. Agreement to give usual covenants on sale – Duty imposed.** An agreement on the part of a seller of real property to give the usual covenants binds the seller to insert in the grant covenants of seizin, quiet enjoyment, further assurance, general warranty, and against encumbrances."

[13] Plaintiff's Brief, page 8.

[14] " . . . any interest in the same through or for *the party of the first part* on demand . . . " from the statute becomes " . . . any interest in the same through or for *him* on demand . . . " in the Plaintiff's Brief.

could except matters Matrix Properties Corporation found acceptable. Otherwise the warranty deed would alter the terms of the Option to Purchase that explicitly provides that TAG Investments need not do any corrective work.

At this point in the argument, the undersigned feels compelled to note that the above comments about the acts of deception on the part of MATRIX have been made before – MATRIX continues to make the same mistakes without correcting them. In June, 1999, their lawyer acknowledged that he had not read the Option to Purchase. Apparently their lawyers do not read our replies to their motions either.

Matrix Properties Corporation sets forth absolutely no written words within the Option to Purchase which would require TAG Investments to correct any title defect. Its attempt to do so constitutes not only a rejection of the option to purchase but an attempt to have the judiciary rewrite the contract. It argues implicitly that TAG Investments is violating a "implied covenant of good faith and fair dealing" as expressed by the Supreme Court in *Barnes v. St. Joseph's Hospital*, 1999 ND 204, 601 N.W.2d 587 (ND 1999). However, the implied covenant of good faith and fair dealing cannot negate substantive terms found in the Option to Purchase, [terms including, but not limited to, TAG Investment's absolute right to choose *not to correct* title defects].

B. Grettum And The Various Parties He Represents are Required to Convey Quit Claim Deeds to Plaintiff.

There is a conclusive presumption that the deed to Carol Grettum is supported by consideration. See N.D.C.C. § 47-10-23.1. Matrix Properties Corporation demands an

affidavit of non-homestead or the joining of spouses of Rostad, Richard or Grettum. The spouses are not parties to this action [if an action even exists] and are not subject to any specific performance order. North Dakota Century Code §32-04-12 states that the following obligations cannot be enforced specifically:

> "3. An agreement to perform an act that the party has no power lawfully to perform when required to do so.
>
> 4. An agreement to procure the act or consent of the spouse of the contracting party or any other third person."

In the instant case, this Court did not order TAG Investments to correct title, nor can it do so. Certain third persons, including Rostad, Richard, or Carol Grettum, are not parties to this lawsuit and cannot be compelled to act. Another reason that Carol Grettum, as grantee of Clapp Family Trust, cannot be compelled to be subject to specific performance for the conveyance as envisioned by Matrix Properties Corporation in its Motion is that specific performance cannot be enforced against a person who has not received adequate consideration. NDCC §32-04-13. Nothing within Matrix Properties Corporation's motions provides for Carol Grettum to have any consideration.

Lis pendens laws have no application to the interest that Carol Grettum received that stems from the Clapp Family Trust. Matrix Properties Corporation contracted with TAG Investments, *and TAG Investments alone*, for an option to purchase. James Grettum consented to a potential quit claiming in order to cure a defect **previous** to October 14, 1996. The Judgment of the Supreme Court merely indicated that the option to purchase was still in

effect and did not expire by its own terms because of Matrix Property Corporation's failure to close on twenty acres prior to June 1, 1999. Carol Grettum received her interest from a warranty deed from James Grettum and stands now in the shoes of the Clapp Family Trust. The only notice that she has from any action is that the identified June 1, 1999, date did not control as far as the termination of an option to purchase between TAG Investments and Matrix Properties Corporation. This determination has nothing to do with the title that she received from the Clapp Family Trust. Moreover, Carol Grettum knew that Matrix Properties Corporation was in default of the Option to Purchase after February 28, 2000, when it did not pay the required option monies.

Even the deeds attached as Exhibit A to Plaintiff's Motion do not comply with the Option to Purchase. Paragraph 13 of the Option to Purchase provides that TAG Investments has no obligation to correct title, and Exhibit A indicates that TAG Investments will warrant and defend against matters of title. The Option to Purchase did not contain any agreement that any "usual covenants" would control.

Similarly, the quit claim deeds do not comply with the Option to Purchase. Matrix Properties Corporation's proposed quit claim " . . . release any and all interest of the grantor" when Paragraph 11 of the Option to Purchase only required quit claims as to matters **previous** to October 14, 1996.

Nothing within Paragraph 11 of the Option to Purchase requires Grettum, Rostad, or Richard to execute quit claim deeds to someone who is not the record title owner of the property.

The settlement statement contains a deduction for county taxes of $2,313.44 which is not authorized by the terms of the Option to Purchase. Although taxes were to be prorated to date of closing, there is nothing in the Option to Purchase that says that TAG Investments would be required to pay its share of the taxes *prior* to the due date of the taxes. There is nothing within the Option to Purchase that allows Matrix Properties Corporation to use TAG Investments' money by withholding from it at time of closing.

The closing did not close within 45 days of the date of the notice [the only identified notice is July 1, 1999, over a year ago].

The option has terminated because Matrix Properties Corporation failed to pay option monies – even after properly notified of the deficiency. TAG Investments further submits that the latest proposed closing comes at a time that the option has terminated because Matrix Properties Corporation failed to pay option monies even after being properly notified with 30 days' notice of the default as required by the terms of the Option to Purchase.

The terms of ¶6 of the Option to Purchase were not complied with by Matrix Properties Corporation – through no fault of TAG Investments. Minimum acreage had not been purchased prior to June 1, 2000. The past tense of the pertinent word ["purchased"] within Paragraph 6 indicates that it must be an *accomplished act of possession*. The word "purchased" refers to a completed act, not an executory contract. Utilizing the Supreme Court of North Dakota's definition, the word "purchased" required the completed act of taking real property, the completed act of acquiring real property, or the completed act of

obtaining real property. Taking, obtaining, and acquiring can be equated with possession, and therefore, since Paragraph 6 says "must be purchased" [using a past tense], Matrix Properties Corporation must have been in possession by June 1, 2000, of 40 acres. This act did not happen. Even the closing statement proposed by MATRIX says that the change of possession to MATRIX has not occurred as of yet. The tax proration date is the date of the change of possession.

This Court cannot force a counteroffer down the throat of TAG Investments – especially when it does not have jurisdiction. TAG Investments had contractual right(s) that are not being honored by Matrix Properties Corporation. After default under the terms of the Option to Purchase on February 28, 2000, and most certainly after termination of the Option to Purchase on June 1, 2000, Matrix Properties Corporation lost whatever rights it earlier acquired.

* * *

POINT 8. THE DEFENDANTS ARE ENTITLED TO A JURY TRIAL ON THE ISSUES RAISED IN PLAINTIFF'S MOTION.

Plaintiff has changed the relief it seeks in this Motion from what it sought prior to judgment. At the time of the Judgment on November 2, 1999, Plaintiff sought a declaration from the Court that the Option to Purchase was still in effect because of its performance by Plaintiff's acquisition of twenty acres in June 1999. Under the present motion, the scope of this action has changed so that now Plaintiff is requesting damages for a claimed

delay in closing occurring post judgment. Matrix Properties Corporation is now trying to wrest the physical possession of the property from Defendant TAG Investments. When a plaintiff claims to own the property while a defendant is in possession, and the plaintiff seeks to recover such possession as well as to determine defendant's adverse claim, the action is a legal one and the parties are entitled to a jury trial. See *Burleigh v. Hecht*, 117 N.W. 367, 370 (S.D. 1908):

> "It is an action brought to quiet title by a party out of possession against one claiming title and in possession. In such an action either party is entitled to a jury as a matter of right. (Citations omitted) . . . In the latter case of *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140, that court held:
>
> > 'If the action were viewed as an action to quiet title or to determine an adverse claim, under section 738 of the Code of Civil Procedure, the Plaintiff being out of possession, and asserting title, and seeking recovery of possession, the plaintiffs would be entitled to a jury trial.' . . . when the action is to recover possession of real property, it is in the nature of an action at law, and not in equity, and it necessarily must be so, for the reason that an action in equity could not have been maintained under the old equity system to quiet title, as the plaintiff in such an action was required to allege and show that he had no remedy at law, and where the plaintiff was out of possession he clearly would have had a remedy at law under the old action of ejectment."

Said South Dakota case was cited with approval in a North Dakota case entitled *Interior Lumber Co. v Kunert, et. al.*, 237 N.W. 780, 782 (N.D. 1931). Being based in law and not equity, a jury trial is also available for the alleged damages Matrix Properties Corporation seeks in its Motion.

* * *

exercise by Matrix Properties Corporation occurring prior to June 2, 2000, the Option to Purchase should be considered terminated by its own terms effective 11:59 p.m., June 1, 2000. TAG Investments assertion is completely consistent with its June, 2000, position that the Option to Purchase had expired by its own terms.

It is noted for the present Motion, when Matrix Properties Corporation demands that TAG Investments' correct title or else pay Matrix Properties Corporation's damages, Matrix Properties Corporation is acting inconsistently with the Option to Purchase. Nowhere within ¶13 of the Option to Purchase is Matrix Properties Corporation given a choice to demand TAG Investments to correct title. Matrix Properties Corporation's present demand [as prayed for in its present Motion] is not an option available to it under the terms of the option. An acceptance introducing new terms or conditions other than those offered in the Option to Purchase amounts to the rejection of the Option to Purchase without forming a contract. *Berg v. Lien*, 522 N.W.2d 455, 456 (N.D. 1994). An exercise of an option upon different terms and conditions provided within the option amounts to a rejection of the option and is a mere counteroffer. *Matrix Properties Corp. v. TAG Investments*, 2000 ND 88, 609 N.W.2d 737. As of June 1, 2000, there cannot be said to be a contract in

existence, nor timely performance by Matrix Properties Corporation, and the Option to Purchase expires by its own terms. This Court has no authority to rewrite the clear and unambiguous contract terms because Matrix Properties Corporation has expressed a desire to purchase TAG Investments' interest under different terms than contained in the Option to Purchase.

SUMMARY

The District Court does not have jurisdiction over the parties or the subject matter. The District Court does not have jurisdiction over persons or entities that have never been made a party to the original action. The District Court is wrongfully being invited to commit error of constitutional dimensions. This District Court should take no action beyond recognizing such concerns by dismissing the pending motion for such reasons. If Matrix Properties Corporation feels capable of supporting another action with law and fact, let it do so according to Due Process of Law.

* * *